

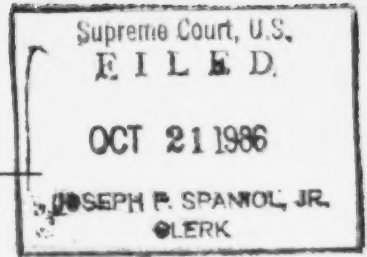
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86-872

(1)

CASE NUMBER: _____



IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1986

SPARTANBURG COUNTY, SOUTH CAROLINA
DEPARTMENT OF SOCIAL SERVICES,

APPELLEE

versus

FRANKLIN W. ALLEN AND JEAN H. ALLEN,

OF WHOM

JEAN H. ALLEN IS ALSO

APPELLEE

AND FRANKLIN W. ALLEN IS

APPELLANT

IN THE INTEREST OF AMANDA JEAN ALLEN,
DOB: 6/21/77

PETITION FOR CERTIORARI

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JANE MATTHEWS, ESQUIRE
BLATT & FALES
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171/290

QUESTIONS PRESENTED

Did the noncompliance with South Carolina Code Of Laws, Annot. (1976), §§15-5-310, 15-5-330, 15-5-350 and 20-7-110; requiring notice to the custodial parent of the appointment of a guardian ad litem violate the father's First Amendment parental rights in that non-compliance created a jurisdictional defect?

Did the application of §20-7-736 of the South Carolina Code Of Laws, Annot. (1976) to mandate a hearing on the merits in Family Court within thirty (30) days in a sexual abuse case when the custodial parent is accused of abuse and also indicted for criminal sexual conduct alleging the same events violate the parent's Fifth Amendment right against self incrimination and also his First Amendment parental rights?



Under the factual situation of a custodial parent being accused of sexual abuse of his child and also indicted for criminal sexual conduct alleging the same events, did the statute, §20-7-690 (B)(1) South Carolina Code Of Laws, Annot. (1976) authorizing the Department of Social Services to share its records with the investigator for the prosecuting (law enforcement) agency violate the parent's Fifth Amendment right against self incrimination? Likewise, did the presence of the investigator for the criminal prosecutor in the final removal hearing violate the father's Fifth Amendment right against self-crimination?

Did the Family Court removal proceeding and subsequent order violate the father's right to due process in that it made a finding wholly unsubstantiated by any competent evidence and without any rational basis?



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STATEMENT OF CASE

This case involves the alleged sexual abuse of a 7-year-old girl by the Appellant-father. The factual background of the case is complex, yet critical for a thorough overview of the case.

The Appellee-Jean H. Allen (mother) and Appellant-Franklin W. Allen (father) were married in 1975. The couple separated in March 1982 and were divorced in January 1983. The father obtained a divorce on grounds of adultery and the court ordered split custody of the daughter. Because of the atmosphere to which his daughter was exposed while in the custody and care of the mother, the father sought full custody of his daughter in April 1984. He was finally awarded sole custody in September 1984. It was just days after the service of the petition for a change of custody that the allegations of sexual



abuse at the hands of the father began to develop. The child informed her guidance counsellor at school in May that her father had placed a hand on her private area. A few days later, the child went back to the same teacher and explained the story was not true and that she had only told it at her mother's instruction. At the time, the father was completely unaware of the allegations. He only learned of these first allegations after the change of custody proceeding began. The daughter had been consistently used as a weapon by the mother against the father in earlier Family Court proceedings concerning custody (See Appendix A).

After the change of custody order of September 1984, the mother did not exercise her first weekend visitation. For the second scheduled visitation weekend, the



daughter was picked up by her two half-brothers. During this visitation the allegations of sexual abuse again surfaced. The father's first knowledge of the allegations occurred at approximately 5:20 p.m. on Sunday, November 4, 1984, when five police officers and two marked police cars arrived at his front door to serve him with notice of his daughter's being taken into emergency protective custody. (See Appendix B). Those police officers refused to reveal any further information and the father could learn nothing at the police station. The next morning, the father returned to the police station and finally determined that his daughter had been taken to a medical clinic by the mother and maternal grandparents on Friday afternoon. The clinic did not physically examine the child but because of the mother's allega-



tions and accusations, the police and Department of Social Services (DSS) were called. Upon the arrival of the police and DSS workers, the entire group (police, DSS, mother, child and maternal grandparents) went to the emergency room at a nearby hospital. The doctor there examined the child, but could report no physical evidence to support the accusations made by the mother. Yet the police and DSS determined the child needed to be placed in emergency protective custody. Despite the "emergency" situation, the child was allowed to spend the remainder of the weekend with the mother.

DSS and the police denied all of the father's requests in regards to seeing his daughter, having a doctor examine her, or a psychiatrist or pastor counsel her. Criminal charges were filed against the father for First Degree Criminal Sexual Conduct.

Subsequent to his arrest and prior to

his criminal trial (which resulted in acquittal), DSS continued with removal proceedings. At the temporary hearing, the Family Court adopted the DSS recommendation to place the daughter in a children's shelter.

Without regard to the pending criminal charges against the father, DSS proceeded with the removal action and a final hearing. The Chief Investigator for the Attorney General's office (the prosecuting agency) attended the Family Court final hearing over the objection of the father and his attorney. Because of the investigator's presence at the hearing, the pendency of the criminal matter, and his desire not to waive his First and Fifth Amendment Rights as applicable via the Fourteenth Amendment, the father elected not to present a case in Family Court.

At the final removal hearing, the Family Court adopted the DSS recommendation which removed the child from the father's custody, gave DSS custody and placed the child with the mother. This was ordered by the Family Court on February 22, 1985. (See Appendix C). The father appealed the Family Court's findings to the Supreme Court of South Carolina asking that Court to vacate the Family Court's Order because the findings were erroneously made and not substantiated by the preponderance of the evidence presented and because the statutory requirement for such a hearing during the pendency of a criminal action would necessarily require a parent-Defendant's waiver of his constitutional rights in order to participate in the Family Court proceedings to protect his parental rights prior to the criminal



trial. The Supreme Court of South Carolina issued Memorandum Opinion No. 86-MO-253 on June 10, 1986, summarily affirming the decision of the Family Court. On July 23, 1986 the Supreme Court of South Carolina denied the father's petition for rehearing. This Petition for certiorari followed.



Within the last two (2) years America has become critically aware of the vast attention focused on child abuse. Radio, television, newspapers, magazines and various publications are filled with horrendous stories. The Courts of our nation, both family and criminal, have been inundated with cases involving children and sexual abuse. This attention has given birth to an phenomenal hysteria, and unfortunately, the rights of innocent parties and parents are being jeopardized under the guise of protecting children.

In 1973, Senator Walter Mondale held a series of hearings on child abuse and neglect. As a result, Congress passed the Child Abuse Prevention and Treatment Act of 1974. 42 USC §§5101-5106 (Supp V. 1975). This Child Abuse Act established a National Center on Child Abuse and Neglect.



Money was appropriated to fund a wide range of research, demonstration, training and technical assistance projects. Additionally, money was provided for state grants. In order for a state to receive this special grant, it had to meet specified eligibility requirements. In addition to every state, the District of Columbia, Puerto Rico, Guam and American Samoa have established the comprehensive laws required by the Act and are receiving the special grants.

Certainly, the state has a legitimate interest in protecting children from various forms of abuse and neglect. However, one particular area or segment of our population has become plagued with waves of false allegations of sexual abuse. This segment involves parents who are involved in seriously contested custody disputes in conjunction with a divorce.¹ Using the



child and allegations of sexual abuse have proven to be effective weapons for obtaining and maintaining the advantage in a custody battle. Allegations of abuse have also been used by the parent who has lost custody as a means for obtaining custody despite earlier proof that they were unfit or at least, not the more desirable party to have custody.

Children who were never abused are being snatched from parents who have struggled and fought for custody of their beloved children. Because of bitterness and cruel antagonism, one parent can make a statement to child protection authorities and thereby cast the first stone of an earth shattering avalanche. Mere allegations by a jilted mother or father trigger the system of laws which should help protect and defend our children. Yet, the

reverse is true where bitterness and anger between spouses results in abuse of the system which purports to protect these children. Through these abuse laws, government is in reality becoming the abuser. In the above described divorce situation the remaining family shell is being destroyed and not protected. A recent study conducted for the National Center on Child Abuse and Neglect--itself a product of the Mondale Act--found that in about half the 400,000 families kept under supervision and compelled to accept treatment for abuse of the children, the parents had never actually abused or neglected their children.²

As stated earlier, children do need protection. Every report of possible abuse should be thoroughly investigated. Emergency protective custody is a good principle yet its application is often

detrimental. The current application of child abuse laws presumes the truth of the allegation and leaves no room for the potential false allegation. While every accusation concerning sexual abuse should be taken seriously, a rush to judgment and prosecution at the expense of one's constitutional rights is never warranted.

Uncontrovertedly, false allegations of child molestation or sexual abuse can and often do lead to disastrous results. Simple allegations of sexual abuse of a child receive sudden and long-term attention and publicity.³ While the nature of such allegations is despicable and may be rightfully deserved by countless people, the system designed to protect children should not also be allowed to defame parents and deprive them of constitutionally guaranteed rights. There is no excuse nor



reason that would allow violation of fundamental constitutional rights of parents and individuals in the name of protection. Procreation, liberty, self-incrimination are all fundamental rights previously recognized by this Court as falling within the First and Fifth Amendments and are subject to strict scrutiny. See, Olmstead v. U.S., 277 U.S. 438 (1928); Stanley v. Illinois, 405 U.S. 645(1972); Lehr v. Robertson, 103 S. Ct. 2985 (1983); Quil-
loin v. Walcott, 434 U.S. 246, 98 S. Ct. 549, 54 L.Ed. 2d 511 (1978); Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 52 L. Ed.2d 531 (1932). Application of child protection laws has become not simply a matter of believing children or protecting them, but one of far-reaching detrimental consequences to individual rights

and freedoms and of great impact upon the family unit. Regretably, the laws which were initially designed and enacted to protect children are becoming mechanisms of further destruction for the family.

In the instant case, fundamental rights guaranteed the father by the First and Fifth Amendments to the United States Constitution have been ignored and violated by the State of South Carolina and its agents. The lower Courts have failed to recognize these violations and adequately address them. The guarantees of the Fourteenth Amendments have been withheld. Under the facts presented here, the state law abridged the privilege and immunities afforded to this father by virtue of the United States Constitution. Due process has never been, and perhaps can never be precisely defined. Lassiter



v. Department of Social Services of Durham County, North Carolina, 101 S. Ct.

2153 (1981) yet the Due Process Clause and the Fourteenth Amendment impose upon the states standards necessary to ensure that judicial proceedings are fundamentally fair. To statutorily require a hearing that forces one to choose between protecting one's rights to family and children and protecting oneself against self-incrimination is unquestionably fundamentally unfair and likewise unconstitutional per se. Equal protection of the laws and due process cannot be afforded to a parent who is charged with sexual abuse of his or her child and faces both removal proceedings and criminal charges. To allow permanent removal proceedings to go forward against such a parent during the pendency of a criminal action when any testimony

elicited could be used against the parent in the later criminal action is unquestionably violative of due process, equal protection and fundamental fairness.

The Appellant-father respectfully asks this Court to grant certiorari in this matter and hear the case on the merits.

Respectfully submitted,

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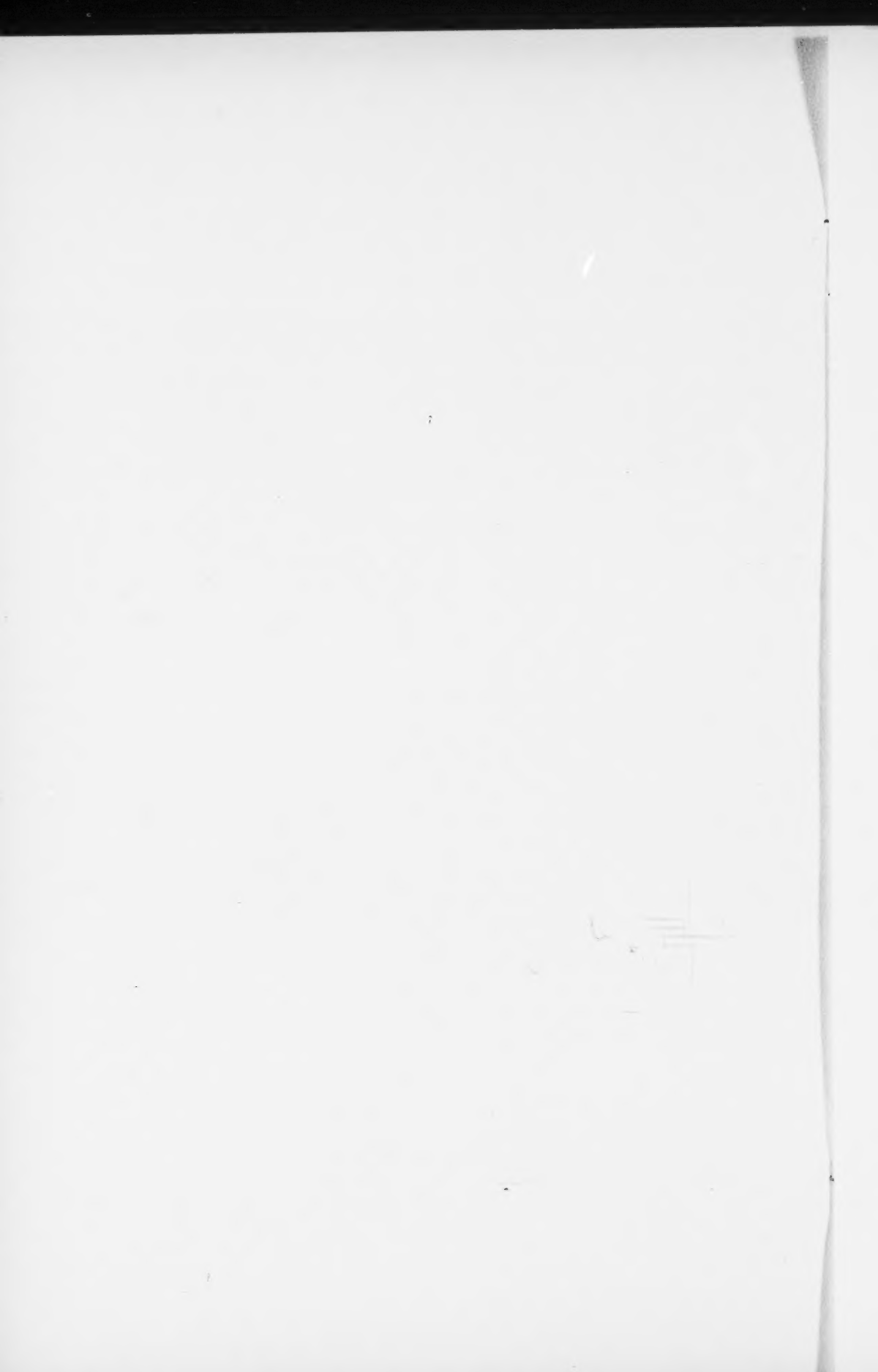
Attorney for Appellee,
Jean H. Allen

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NOTES

¹Corey L. Gordon, "False Allegations of Abuse in Child Custody Disputes,"
2 Minnesota Family Law Journal
14 July/August 1985.

²Scott Kraft, "False Child-Molestation charges lead to personal disasters,"
The Reno Gazette-Journal, February 17,
1985. Also appeared Los Angeles Times,
February 11, 1985. Also, Patricia Ohmans,
"A Family Abused/The Other Side of the
Story" City Pages (Minneapolis/St. Paul,
MN) April 4, 1984.

³Elissa P. Benedek, M.D. and Diane
H. Schetky, M.D. "Allegations of Sexual
Abuse in Child Custody Cases"
Emerging Issues in Child Psychiatry and
the Law, New York: Brunner/Mazel, Inc.
1985 and also, Lee Coleman, M.D.,
"False Allegations of Child Sexual Abuse"
13 Forum 1 (California Attorneys for
Criminal Justice), January/February 1986.



THE STATE OF SOUTH CAROLINA
In The Supreme Court

Spartanburg County Department
of Social Services,.....Petitioner-
Respondent,

v.

Franklin W. Allen and
Jean H. Allen,.....Respondents,
of whom Jean H. Allen
is also.....Respondent
and Franklin W. Allen
is.....Appellant,

In The Interest of:
Amanda Jean Allen, DOB: 6/21/77

Appeal from Spartanburg County
David N. Wilburn, Jr., Family Court Judge

Memorandum Opinion No. 86-MO-253
Heard May 21, 1986 - Filed June 30, 1986



AFFIRMED

Toney J. Lister, of Spartanburg, and Jane Matthews, of Blatt & Fales, of Barnwell, for appellant.

Virginia W. Batson, of South Carolina Department of Social Services, of Columbia, for Petitioner-Respondent Department of Social Services.

Harry A. Chapman, of Greenville, for Respondent Jean H. Allen.

Jim S. Brooks, of Spartanburg, Guardian ad Litem for Amanda Jean Allen.

PER CURIAM: We affirm pursuant to South Carolina Supreme Court Rule 23. See S.C. Code Ann. §20-7-755 (1976)(the general public shall be excluded from trials in cases of children and only such persons admitted as the judge shall find to have a direct interest in the case or in the work of the court); S.C. Code Ann. §20-7-736 (1976)(trial court's finding of abuse was supported by the preponderance of the evidence); Rosamond Enterprises, Inc., v. McGranahan, 278 S.C. 512, 299 S.E.2d 337 (1983) (procedure used for appointment of guardian was not raised at trial and is precluded from being considered on appeal); Associate Management, Inc., v. E.D. Sauls Construction Company, 279 S.C. 219, 305 S.E.2d 236



SPARTANBURG COUNTY DSS v. ALLEN, et al.

(1983) (admission of evidence is largely within discretion of trial judge).

s/ J. B. Ness C.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

s/ A. Lee Chandler A.J.

s/ Ernest A. Finney, Jr. A.J.



THE SUPREME COURT OF SOUTH CAROLINA

July 23, 1986

Jane Matthews, Esquire
Post Office Box 365
Barnwell, South Carolina 29812

Re: Spartanburg County DSS v.
Allen, et al.

Dear Ms. Matthews:

The Court has refused your Petition
for Rehearing in the above entitled matter
in the following order.

"Petition denied.

s/ J. B. Ness C.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

s/ A. Lee Chandler A.J.

s/ Ernest A. Finney, Jr. A.J.

July 23, 1986."

The remittitur is being forwarded to
the Clerk of Court for Spartanburg County.

Sincerely yours,

Clyde N. Davis, Jr.
CLERK

CND,Jr/krp

cc: Toney J. Lister, Esquire
Jim S. Brooks, Esquire
Virginia W. Batson, Esquire
Harry A. Chapman, Esquire

STATE OF SOUTH CAROLINA)	IN THE
)	FAMILY
COUNTY OF SPARTANBURG)	COURT
Franklin W. Allen,)	
)	
Petitioner,)	
)	ORDER
vs.)	
)	Case No.
Jean H. Allen,)	84-DR-42
)	-944
Respondent.)	

This matter is before the Court on Order of Remand from the Supreme Court of South Carolina dated July 13, 1984. The primary issue is to determine whether there are changed circumstances to justify reconsideration of the Family Court Order dated January 24, 1983 regarding custody of the parties' minor child, Amanda Jean Allen.

The Petitioner-Husband filed a Supplemental Petition on May 2, 1984, requesting custody of his minor child on the ground of change in conditions

since the Order of January 24, 1983. The Respondent-Wife filed her return and counterclaim denying the material allegations of the Petition; she also denied that the Court had jurisdiction, since the Order of January 24, 1983, was on appeal to the Supreme Court, and requested attorney's fees. On motion by the Petitioner, the Supreme Court remanded the issue of custody to this Court. A hearing was held on August 14 and 16, 1984. Present were the Petitioner and his attorneys, William B. James and Tony J. Lister, the Respondent and her attorney, Russell W. Harter, Jr., of the firm of Marchbanks, Chapman, Harter & Groves, and David F. Wood, Attorney, the duly appointed Guardian ad Litem for the minor child, Amanda Jean Allen.

Since the only issue involved was

whether changed circumstances existed to justify a modification of the Order of January 24, 1983, by changing custody of the minor child, the Court instructed the parties that the testimony would be limited to events that occurred subsequent to that date.

It is evident from the testimony presented that changed circumstances have occurred to justify reconsideration of the Order of January 24, 1983 regarding custody of the parties minor child.

After hearing the testimony and evidence presented in the case and viewing each of the witnesses as to their demeanor and credibility, I make the following:

FINDINGS OF FACT

That the parties were married on August 15, 1975, and are the parents of Amanda Jean Allen, born June 21,

1977.

The Respondent had previously been married to George W. Davenport. She had two boys, Skip and Mark, ages 13 and 15 years, by that marriage, who resided with Petitioner and Respondent. This marriage terminated in a divorce in 1975. Davenport vs. Davenport, 265 SC 524, 220 SE2d 228 (1975).

The parties separated in March, 1982. Thereafter, the Petitioner filed suit for a divorce on the ground of adultery, custody of the minor child Amanda, and other relief.

The divorce action was heard by the Honorable Joseph W. Board, who issued an Order on January 24, 1983. With respect to the divorce and custody issue, Judge Board granted Petitioner a divorce on the ground of adultery and divided custody of the minor child

between the parties. The Petitioner was granted custody of the minor child during the summer months and the Respondent during the school months, with each having certain allotted visitation periods.

The parties both agree that the arrangement of divided custody of Amanda as provided in Judge Board's Order is not feasible. They also agree that one parent should have custody of Amanda with visitation provided to the non-custodial parent.

The Respondent admits that she started dating Don gardener in December, 1983. She felt that they were good for each other and his children played with her children. He would help Amanda with her school work and her two boys, Skip and Mark, work on their bicycles and at times he would take them to school. A neighbor

of the respondent testified that during his walks late at night in december of 1983 he observed on several occasions Gardener's car parked not more than a block from Respondent's home. The private detectives hired by Petitioner testified that from their surveillance of Respondent's home they observed Gardener, on three occasions in april, 1984, enter the Respondent's home in the late afternoon and he did not leave until the next morning; that the Respondent and the children were in the home at the time. She testified that he would come to her home late at night and enter her bedroom through the patio door; that she would lock her bedroom during the night and Gardener would leave the home the next morning before the children got up.

The Respondent had knowledge through



the local newspaper dated January 25, 1984, that Gardener had plead guilty to certain drug offenses and was placed on probation. In July, 1984, she met Gardener at a local bar, where they had a drink. They began to argue and she left the bar alone. Upon arriving home she found a window pane broken, some of her clothes were in the garage with a liquid substance like kerosene poured on them. After she went to bed, a man came into her room who hit her on the head; she struggled with him and ran out in the yard and the man left. This incident was investigated by the police but no charges have been made. The children were fortunately not at home during this time.

In June, 1983, the Respondent admits that she and another school teacher, went to the Ramada Inn lounge which



businessmen frequent. She became acquainted with John Barrentine, with whom she had a drink. She testified that she does not remember what happened thereafter until they were at the home of Ms. Judy Solesby and the police officers had arrived. Ms. Solesby testified that Respondent and Barrentine came to her home late that night. The Respondent was very drunk, using vulgar language, and admitted having sex with Barrentine. This was the first time Ms. Solesby had seen the Respondent. When she asked her to leave, Respondent broke a wine glass and cut Ms. Solesby which required her to obtain emergency treatment. Ms. Solesby was paid \$2,500.00 in damages, including her medical expenses as a result of this incident. The Respondent did apologize to Ms. Solesby for her actions. As a result

of this incident, the respondent admits that she was charged with disorderly conduct for which she paid a find of \$37.00.

Respondent also admits that she told the Petitioner to stay away from Amanda's school, where he was inquiring about her schoolwork and activities. For the past two years she has refused to permit Amanda to engage in YMCA activities due to Petitioner's involvement. By these acts the Respondent is using the child as a pawn against the Petitioner which I find is detrimental and is not in the best interest of Amanda. Respondent's attitude in this respect can only be classified as "spiteful."

Mrs. Allen was involved in an action concerning her two older children, by her marriage to George Davenport, Skip and Mark, and in October, 1983, a

Consent Order was issued by Judge Patterson which held, among other things, the following:

...Neither party shall engage in any sexual activity in the home or residence of either child, whether or not either or both children are then present in the home, except with a spouse to whom such party is then legally married. In no event shall either party engage in any sexual activity in front of either child. Further the Petitioner shall not have any male person spend all or a substantial portion of the evening in her home at any time(s) unless such male person is related to the Petitioner within the fourth degree...

The Respondent admits violating this portion of the Order which I find is indicative of her continuous conduct to satisfy her carnal desire which is

contrary to the best interest of Amanda.

I find that the Petitioner is a very stable individual who is concerned about the welfare of Amanda. He is very sensitive to her problems, evidenced by not telling her of this pending litigation and the absence of any evidence derogatory toward Petitioner. He is a member and attends the First Presbyterian Church where he also takes Amanda when she is with him. He has purchased a home in the area where Amanda attends school so that a change of custodial arrangement would not be disruptive. His home is also in close proximity to Respondent's home so that her sons, Mark and Skip may visit Amanda at any time. He has also sought professional guidance for Amanda due to the continued tumultuous situation. He



works out of his home and will be available to Amanda at all times and his mother and sister will assist him if needed. I find that it would be to the best interest and welfare of Amanda for her custody to be with Petitioner.

Respondent's testimony reflects that she is a good mother and school teacher; that Amanda is a good student, well behaved and neat in appearance. I find that this testimony is insufficient to overcome the admitted misconduct of the Respondent and the detrimental effect it has had on Amanda. The Respondent's lack of regard for the moral training and spiritual growth of Amanda is evident. Her total disregard and failure to encourage a good relationship with Petitioner cannot be excused. The Respondent



cannot transmit the proper values, training and attitude to Amanda when her actions and conduct so grossly transmit them to the contrary.

Amanda is the victim of a broken home. She is confused and has reached the point that she does not think it is proper to love one parent without hurting the other which I find has been caused primarily by the acts and conduct of the Respondent. Mrs. Burns of the Department of Social Services testified and I find that Amanda is in need of professional counseling to assist her with her problems and that counseling would also be beneficial to the parties.

The Guardian ad Litem, after hearing all of the testimony in the case, has filed a memorandum recommending that custody be granted to the Petitioner. This memorandum is made a part of this



Order by reference and will be filed with the Clerk of Court as part of the record.

The Respondent has requested the payment of her attorney's fees from the Petitioner. She was well represented by counsel who, according to his affidavit spent twenty-four (24) hours in the preparation and trial of the case. Since this action was instituted due to Respondent's misconduct and she was not successful in her defense, nor establishing her objectives under her counterclaim, I find that her request for attorney's fees should be denied.

Taking into consideration all of the facts and circumstances of the case, I find that changed circumstances have occurred since the Order of January 24, 1983 to justify awarding custody of Amanda to Petitioner.



CONCLUSIONS OF LAW

1. That jurisdiction exists over the parties and the subject matter, and that all parties are properly before the Court and all proceedings were regular in all respects.

2. The controlling consideration in determining child custody must of necessity be the welfare of the child, and the facts and circumstances of each case must be examined. Bonnette vs. Bonnette, 276 SC 653, 281 SE2d 790 (1981). We must look to all of the facts of this case and are given the "awesome" task of looking into the past and predicting which of the two available environments will advance the best interest of the child[ren]. Cook vs. Cobb, 271 SC 136, 142, 245 SE2d 612, 615 (1975)". Cole vs. Cole, 274 SC 449, 265 SE2d 669 (1980).

3. The morality of a parent is a



proper factor for consideration but is limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child. Custody of a child is not granted a party as a reward or withheld as a punishment. Davenport vs. Davenport, 265 SC 524, 527, 220 SE2d 228, 230 (1975). Cole vs. Cole, supra; Bonnette vs. Bonnette, supra. In order to change child custody as fixed by court order, there must be a showing of changed circumstances accruing subsequent to the entry of the decree which would warrant modification for the best interest of the child. Heckle vs. Heckle, 266 SC 355, 223 SE2d 590 (1976); Pullen vs. Pullen, 253 SC 123, 169 SE2d 376 (1969). A change in circumstances justifying a change in the custody of a child simply means that sufficient facts have been shown



to warrant the conclusion that the best interest of the children would be served by the change. Stutz vs. Funderburk, 272 SC 273, 252 SE2d 32, 34 (1979). Baer vs. Baer, Court of Appeals Opinion No. 0222, August 3, 1984.

4. This is not a case where there has been a moral lapse. Davenport vs. Davenport, supra; Cole vs. Cole, supra; Bonnette vs. Bonnette, supra; nor a situation where the party married the paramour. Baer vs. Baer, supra.

5. Adultery must be proved by a clear preponderance of the evidence. Gainey vs. Gainey, 277 SC 519, 290 SE2d 242 (1982). Here we have the Respondent admitting her adulteress relationship with other men.

6. An allowance for counsel fees may be denied to a wife who has been



guilty of marital misconduct or who has refused to abide by an Order of the Court. 27A CJS §222(g) page 976. In fixing an award of attorney's fees, factors to consider include nature, extent and difficulty of services, time devoted, professional standing of counsel, contingency of compensation, and the beneficial result accomplished. Collins vs. Collins, 239 SC 170, 122 SE2d 1 (1961). When Petitioner achieved the principal relief sought by him, the Respondent should not have been accorded attorney's fees. Peebles vs. Disher, Court of Appeals Opinion No. 0029, December 28, 1983, 310 SE2d 823 (1983).

NOW, THEREFORE, IT IS ORDERED:

That the Order of January 24, 1983 with respect to custody of the minor child is hereby modified as follows:



1. That Petitioner, Franklin W. Allen, is hereby granted full custody of the minor child, Amanda Jean Allen. This custody shall carry with it all of the responsibilities of care, control, and support of Amanda.

2. The Respondent, Jean H. Allen, shall have visitation with Amanda as follows:

A. The first (1st) and third (3rd) weekends of each month, which shall begin at 5:00 p.m. on Friday and end at 5:00 p.m. on Sunday. The provisions of this paragraph shall begin with the third (3rd) week of October, 1984.

B. Alternate holidays as follows:

1) Thanksgiving beginning at 5:00 p.m. on Wednesday and ending at 5:00 p.m. on



Thursday, and shall start with Thanksgiving, 1984.

2) Easter from Saturday at 12:00 p.m. until Sunday at 5:00 p.m., beginning in 1986.

C. Christmas from 2:00 p.m. on Christmas Day and ending at 5:00 p.m. on January 1st.

D. Each Mother's Day shall be with Respondent without regard to which parent Amanda is with that weekend.

E. Each Father's Day shall be with Petitioner without regard to which parent Amanda is with that weekend.

In items D. and E. above, should Amanda be with Petitioner on Mother's Day or Respondent on Father's Day, the proper parent shall pick her up at 5:00 p.m. on Saturday, and



she shall be returned to the proper parent no later than 5:00 p.m. on Sunday.

F. Amanda's birthday shall be spent one-half (1/2) with Petitioner and one-half (1/2) with Respondent. Whichever parent she is with on the day her birthday falls shall keep her until 1:00 p.m. The other parent may pick her up at that time and she must be returned to the proper parent by 7:00 p.m.

G. Amanda shall spend the first (1st) week of the months of June, July, and August with Respondent. These weeks shall begin at 5:00 p.m. on the last day of May, June, and July, and shall end at 5:00 p.m. on the 7th of the months of June,



July, and August.

It is the intention of this Order that Respondent will pick up Amanda at Petitioner's home and return her as stated herein. Petitioner will have Amanda ready to go with necessary clothing, etc., and Respondent shall return her with all clothing, etc., as provided.

3. Petitioner is hereby directed and ordered to secure within thirty (30) days from date a family counselor for the parties and Amanda, and shall attend such sessions as may be necessary. The Petitioner shall be responsible for all expenses for himself and Amanda, and Respondent shall be responsible for all of her expenses.



4. The Guardian ad Litem, David F. Wood, is entitled to a reasonable fee of Seven Hundred Fifty and no/100 (\$750.00) Dollars, which amount shall be paid one-half (1/2), Three Hundred Seventy-five and no/100 (\$375.00) Dollars, by Petitioner, and one-half (1/2), Three Hundred Seventy-five (\$375.00) Dollars by Respondent. The parties shall each file a receipt of payment of the above amount with the Clerk of Court on or before thirty (30) days from date hereof.

5. Both parties are hereby enjoined from making any disparaging remarks to or about the other in the presence, or hearing, of the minor child, Amanda, nor shall they allow anyone else to do so. The parent with whom Amanda is with shall be responsible for the fulfillment of this direction.



6. The request for attorney's fees by Respondent is hereby denied.

7. This Order shall take effect immediately and the Respondent is hereby ordered and directed to assist the petitioner in moving all of the belongings of Amanda, including, but not limited to, clothing, toys, school supplies, furniture, toilet articles, etc.

8. The Petitioner is hereby relieved of payment of child support to Respondent.

9. That in all other respect the Order of January 24, 1983 shall remain in full force and effect.

10. The Respondent's Petition and Counterclaim is hereby dismissed.

11. The parties are hereby restrained and enjoined from interfering with each other in any manner whatsoever.

I verily believe that the above
Order is in compliance with the
requirements of Rule 27(c) of the
Rules of Practice for the Family
Courts.

s/ Wm. K. Charles, Jr.

Wm. K. Charles, Jr.
Judge, Family Court

Greenwood, South Carolina

Date: September 28, 1984

STATE OF SOUTH CAROLINA) IN THE FAMILY
COUNTY OF SPARTANBURG) COURT
82-DR-42-944

Franklin W. Allen,)

Petitioner,)

vs.)

Jean H. Allen,)

Respondent.)

ORDER

This action for divorce, custody, support, alimony and division of property was heard by the Court beginning on November 6, 1982. More than four days of testimony was taken, twenty-seven witnesses testified and sixty-two exhibits admitted. The Petitioner seeking a divorce on the grounds of physical cruelty, custody and an equitable division of the marital property was filed on May 11, 1982. In due time Respondent answered and counterclaimed seeking separate support and maintenance, custody and



support. A temporary hearing was held and Order made on June 18, 1982. In July 1982 Petitioner amended his Petition to seek a divorce on the additional ground of adultery. Respondent in due time filed her Amended Answer and Counterclaim seeking separate support and maintenance, custody, support, equitable division of the property and attorney fees.

This case was set for trial in August 1982, before the Honorable David Baroody but was continued. It was again set for trial for two days on September 29, 1982. Upon Motion of counsel for Respondent, who was in Federal Court, the case was continued until September 30. On September 30, 1982, the Federal Court refused to cooperate with the Court and counsel



for Respondent was forced to move for a continuance again.

The Court held a second pre-trial conference on October 12, 1982. Counsel were advised at that time that no more continuances would be granted except for legal cause. Counsel advised the Court that all issues were joint and framed by the pleading.

The case was scheduled for two days on October 18, 1982. However, the death of Respondent's grandmother resulted in another continuance. At this time Respondent and her counsel requested the Court to allow Mrs. Bannister to withdraw from the case and be relieved from representing Mr. Allen. The Court, while signing the Order relieving counsel, strictly cautioned Respondent and counsel there would be no more continuance except



for the most compelling reason. Mr. Bannister advised the Court that Hagins of the Greenville County Bar had agreed to represent Mrs. Allen. Also, at the October 18 hearing, Mr. Charles M. Pace appeared with an Order signed by the Honorable K. R. Huckaby, Clerk of Court. The Order appointed the said Mr. Pace as Guardian Ad Litem for the infant child for the parties. It was based upon the Petition made by Mrs. Allen on October 15, 1982, late Friday afternoon before the case was to begin on Monday morning. Mr. Pace made a number of motions before the Court in an obvious attempt to delay the proceedings and disrupt the case. Counsel for Respondent assured the Court the Petition was filed without his consent, knowledge or advice. The Court dismissed the Order of the Clerk



by Order dated October 18, 1982 for the reason set forth therein.

From October 18, 1982, until the date for the trial, the Court had no communication from counsel for Mrs. Allen except a call from Mr. Wilkins requesting a continuance because of a conflict. The conflict did not materialize. The case finally began on November 16. At the call of the case for trial, counsel for Mrs. Allen moved the Court to allow her to file a second Amended Answer and Counterclaim. Then, for the first time, Mrs. Allen sought a divorce on the grounds of adultery and physical cruelty. The Court denied the Motion. The acts alleged to constitute the grounds occurred before the filing of the original and the Amended Answer and Counterclaim. (Mrs. Allen



testified she did not want a divorce now and did not prove the allegations during the trial.) Therefore, with all issues joined, the Court took testimony and received evidence as aforesaid and based thereon I make the following :

FINDINGS OF FACT

A. GENERALLY

1. That the parties were married on August 15, 1975. That one child was born, namely, Amanda, in June 1977.

2. The Petitioner is in good health, is thirty four years of age, a practicing attorney in Spartanburg, South Carolina, that he held the Office of Mayor of Spartanburg from 1977 until January 1982. This is his first marriage.

3. The Respondent is in good health, is thirty seven years of age,

holds a Bachelor's Degree from Furman University and holds a Master's Degree in Education, a state teacher's certificate and is a licensed real estate agent doing business in Spartanburg. This is her second marriage, having been married once before to a George Davenport from whom she was divorced after seven years on the ground of adultery. After appeal from the Supreme Court she was awarded custody of two boys, now aged thirteen and eleven.

4. The parties resided together until March 1982, when the Petitioner moved out of the marital residence after an argument. They have resided separate and apart since that time. Petitioner sought temporary custody of his minor daughter at a pendente lite hearing on June 1982. However, the



child was temporarily placed with the Respondent mother until the final hearing. Petitioner has paid certain enumerate items ordered in June 1982 until the present time. I find that Mr. Allen can not continue to maintain Mrs. Allen in the same style as required by the temporary Order. He must have some relief and this case must be finalized.

5. That all relief not specifically granted herein, be and the same is hereby denied.

6. There is no possibility of reconciliation.

B. ON THE ISSUE OF DIVORCE

1. The Court has no doubt about the illicit sexual activities of the Respondent. Petitioner hired a detective firm, Spartan Detective Agency, and two of its employees



testified. After surveillance of the Respondent and one Lee Manatis the detectives found them together under circumstances where they had the time, place and inclination to commit adultery. On the first occasion, the evening of July 11, 1982, they observed Mrs. Allen go into the residence of Lee Manatis and remain there for several hours. Again, on the evening of July 16, 1982, they observed a male inside the residents of Mrs. Allen, observed the lights go on and off in various rooms , and a male and a female appearing nude through a window. The male remained in the house with Mrs. Allen while the detectives kept surveillance until morning. A neighbor, Regnald Smith, testified he heard and then saw an automobile which he recognized as



belonging to Lee Manatis. The automobile came into the drive and parted at the parties' residence while Mrs. Allen was home in July 1982. This was during the parties' separation. The testimony of Mrs. Allen is unbelievable on these incidents and many other issues. The Court is convinced she is again, guilty of adultery.

2. This of course bars her from her claim of alimony.

C. ON THE ISSUE OF CUSTODY

Amanda is now five and one-half years of age. The Petitioner has sought custody of his child throughout the proceedings. He testified that he was capable and had been able to look after and care for her needs. The testimony reveals, and the Respondent herself testified, that he was an



excellent father. Petitioner became very close to Respondent's two sons and, even after the separation, one of the boys asked Mr. Allen to chaperon a trip for him and his class. The only real complaint of any substance by Mrs. Allen against Mr. Allen was that he stayed at work late and was not home by dinner time.

Her complaints of physical cruelty were uncorroborated and the Court finds no acts of physical cruelty on the part of the Petitioner. She complained he did not give her any money. I find from the testimony that this is not the case. He provided for her in a lavish style with a nice home, a lake house, numerous trips overseas and throughout the United States while he was Mayor of Spartanburg, numerous gifts of jewelry



and furs; he provided a full time maid for her during the marriage. Her testimony was equivocal, evasive and unbelievable. She tells the Court that she married a monster yet she still loves him and does not want a divorce. Her demeanor on the witness stand and overall behavior throughout the length of all the proceedings need to be observed, as they were by the undersigned finder of fact, to recognized the unbelievable nature of her responses. She has a Master's Degree and has taught school and sells real estate yet tells the Court she knew almost nothing about the finances or real estate transactions of her husband. She would have one believe she is naive, inexperienced and unwise in the facts of domestic life with this husband yet she has been through



a tumultuous divorce from her first marriage. Her answers were quick, to the point, and seem almost practiced on the question of what duties she preformed in this marriage. Yet she was very evasive on the questions on her conduct and business affairs. She presented cancelled checks of her parents sand their testimony in an attempt to show that she was practically destitute. I find that the funds spent by her parents on behalf of the Respondent and her children were gifts, trips and events that her parents wanted and did do for Respondent and their grandchildren. I find no failing on the part of the Petitioner to provide Respondent with all the necessities and in addition thereto a number of luxuries.

Since the separation, I find



Respondent's acts to be mean and vindictive. Her attitude with regard to charging high phone bills and gasoline bills to the Petitioner was spiteful. However, her use of the child as a weapon against the Petitioner was the most reprehensible. Her attitude with regard to Petitioner's rights to visitation was harmful to the child and degrading to Petitioner. While her adulterous and immoral conduct with another man during her first marriage may have been "moral lapses and not indicative of a continued course of conduct", the facts have proved otherwise. Testimony by Respondent is that she is the perfect mother and wife. She testified that she did everything in the home as well as performing as the Mayor's wife. One wonders what the



maid did.

The Petitioner is a practicing attorney. His tax records and financial statements indicate that he had to borrow money from several sources to maintain Respondent in the life style which she enjoyed. The future of the minor child demands a parent with a stable and settled life style. Considering all of the testimony I find that of Petitioner the most reliable and believable. I find the testimony of Respondent to be shallow. It lacks the ring of truth in numerous instances and appears fabricated in others.

The best interests of the child in a custody case must be the final criteria. The Respondent's recent habits of going to church and being particularly attentive to Amenda have



occurred since the separation. Each case must rest on its own facts. This case is unique in that one parent has an established record on her past conduct. The Respondent has displayed an amazing lack of concern for the need to set a moral example in raising children.

Several witnesses testified to the Petitioner's fitness as a parent. Dr. Rozema, a physician in family practice, a family friend and frequent visitor with the parties, has a daughter in school with Amanda. He testified that Mr. Allen was the more suitable parent; that father and daughter have formed a strong parent-child bond. The Pastor of the Second Presbyterian Church who counseled with the parties and is familiar with the situation testified that the father



provided the more stable environment. I find the father to be a fit and proper person to raise the young girl.

This child has been residing with her mother since the separation. The mother has a flexibility in her employment scheduled to be at home after school hours. She has with her the two sons from a previous marriage. The testimony is that the children have formed a strong sibling bond. That Amanda loves the two boys and they love her. At this time, I find it would be tantamount to splitting up siblings to now take the child from her present family environment on a permanent basis. However, as concluded above, the father is a fit a proper person to participate in raising his child. I am convinced the mother would be uncooperative with any



regular visitation program. The father's work schedule is not as predictable as the mother's. He would have to make several adjustments to tend to the needs of the child on a regular basis during the school year. Therefore, because of the need for Amanda to live a portion of her life with her half-brothers and also have the benefit of the love and training of her father, I find this to be a very rare case where split or divided custody to be in the best interest of the child. The Court does not favor split or divided custody. However, here there is an extraordinary circumstances. Amanda has two half-brothers with whom she has resided with all of her life and this arrangement is in the best interest of Amanda and her half-brothers. The



Court will not hesitate to award custody to the father if the mother in any way interferes or fails to cooperate with the arrangement the Court herein outlines. She must not counsel Amanda in any way derogatory or unfavorable with respect to the father. But for the presence of the two boys and the need for Amanda to live some portion of her life with them, the Court would award custody to the father. The mother shall not "use" the child in any instance with regard to the visitation or the time of custody with the father.

D. ON THE ISSUE OF PROPERTY DISTRIBUTION

1. The parties own a home a 528 Sherwood Circle. The purchase price in June 1976 was Ninety Nine Thousand (\$99,000.00) Dollars. Mrs. Allen places a value on the home of at least



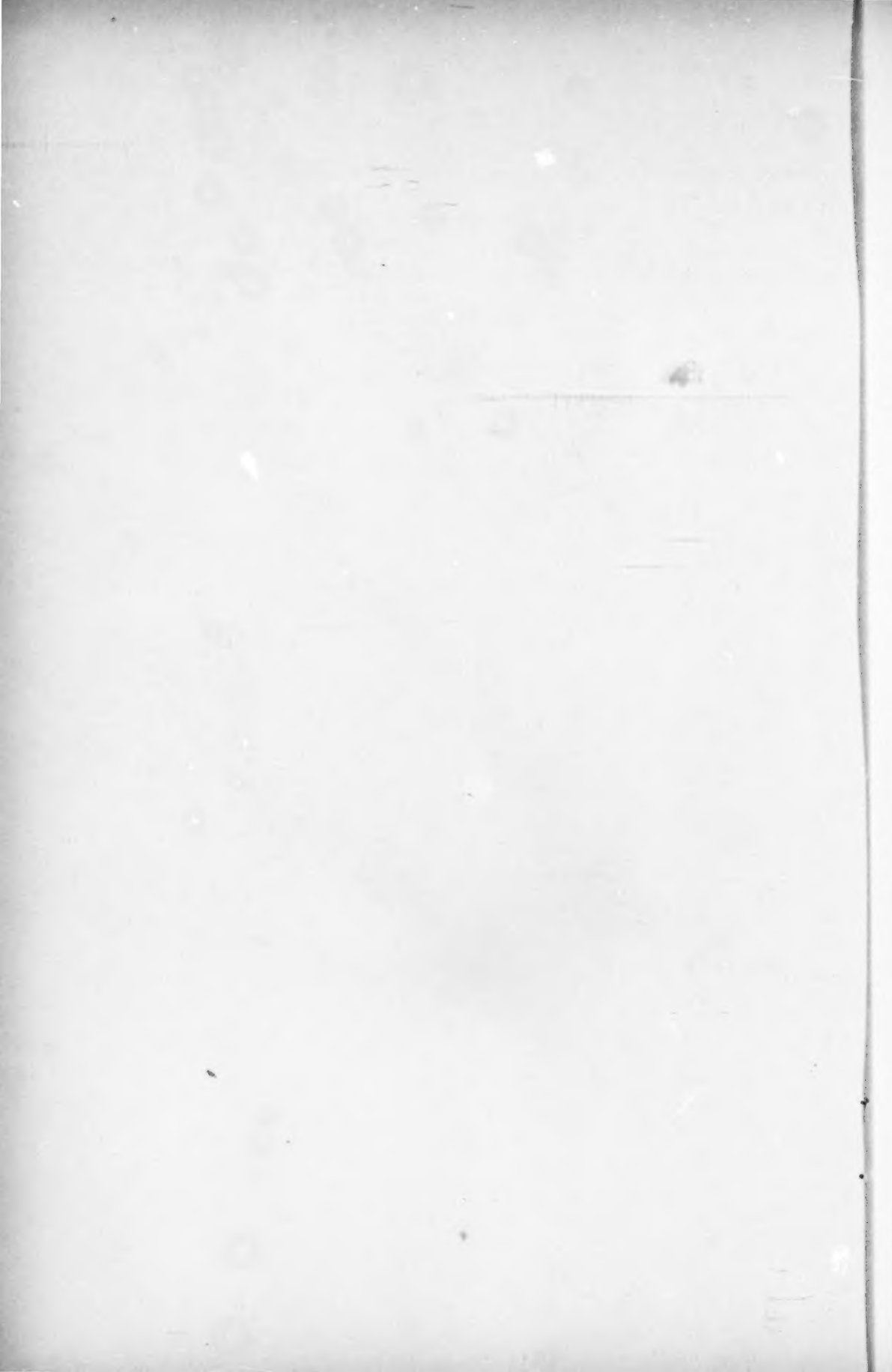
Two hundred Fifty Thousand (\$250,000.00) Dollars. Mr. Allen places the value at about Two Hundred Twenty Five Thousand (\$225,000.00) Dollars. The Court is of the opinion that the home would bring at least Two Hundred Thousand (\$200,000.00) Dollars. There mortgage balance being Fifty Eight Thousand (\$58,000.00) Dollars.

2. The lake house on Lake Lanier was built by the parties on a lot purchased for Twelve Thousand (\$12,000.00) Dollars in March 1977. Even though the title to the property is in Frank Allen, I find the Respondent to have an equitable interest in the property. Mrs. Allen places a value on this at One Hundred and Fifty Thousand (\$150,000.00) Dollars. Mr. Allen believes the

property is worth about Ninety Thousand (\$90,000.00) Dollars. The Court is of the opinion the most it would bring on the market today is approximately One Hundred Thousand (\$100,000.00) Dollars. There is a mortgage balance of Sixty One Thousand (\$61,000.00) Dollars. This will not be a readily marketable piece of real estate.

3. The law office is owned by Mr. Allen. I find Mrs. Allen to have no interest in this property. The mortgage debt exceeds its value.

4. Mrs. Allen claims an interest in a farm owned by Mr. Allen's sister. The farm was purchased by Mrs. Masters before the marriage. If Mr. Allen has any interest in it at all it is equitable and attached before the marriage. Respondent can show no



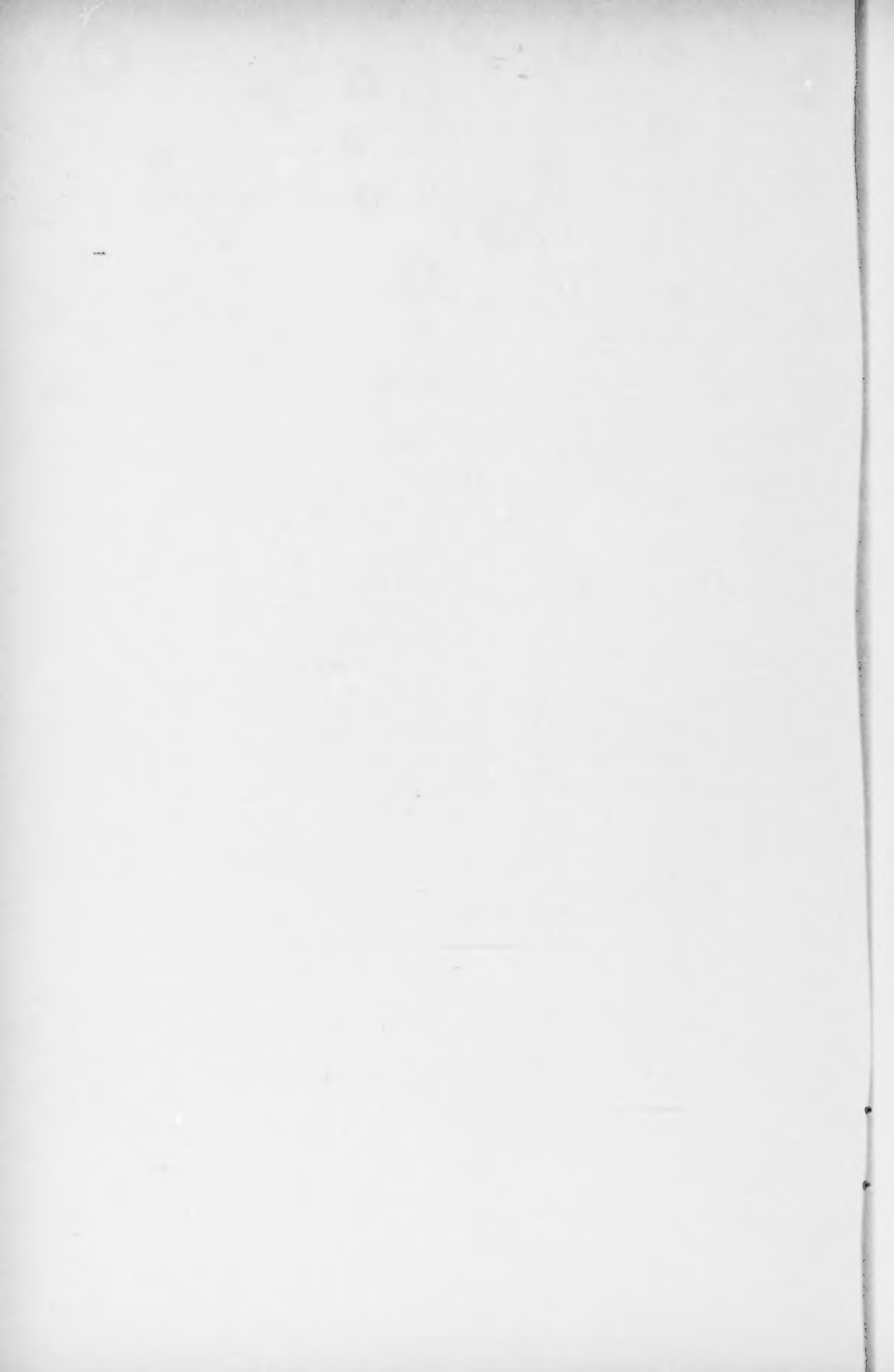
funds going into the property and I find she has no interest therein.

5. There is testimony on the value of the personal property in the home and lake house being of the value of One Hundred Thousand (\$100,000.00) Dollars. Mrs. Allen claims she is the owner of at least three-fourths of everything in the marital home. However, I find that the only items of which she is the owner are those specifically enumerated and awarded to her by the divorce Decree of her first marriage. (Petitioner's Exhibit no. 1, page 3.) All inter-spousal gifts are martial property and subject to distribution. I find each party to be the equitable owner of one-half of the personal property located in the marital home and the lake house. The process of division of personal items



is always very hard when there is no evidence in the record, except for the itemized gifts my Mr. Allen to Mrs. Allen on his financial worksheet. The Court will allow the parties to attempt to divide up the property between themselves with the wife retaining her gifts from Mr. Allen and the personal items set out in the final Decree of her first divorce and the husband all of his law office furniture and equipment (including any pieces of furniture stored in the marital home). Each party shall keep and maintain the automobile they are now driving. In the event the parties can not agree on the equitable division of the personal property, they shall submit a written inventory and the Court will order a division.

6. The parties now own a number of

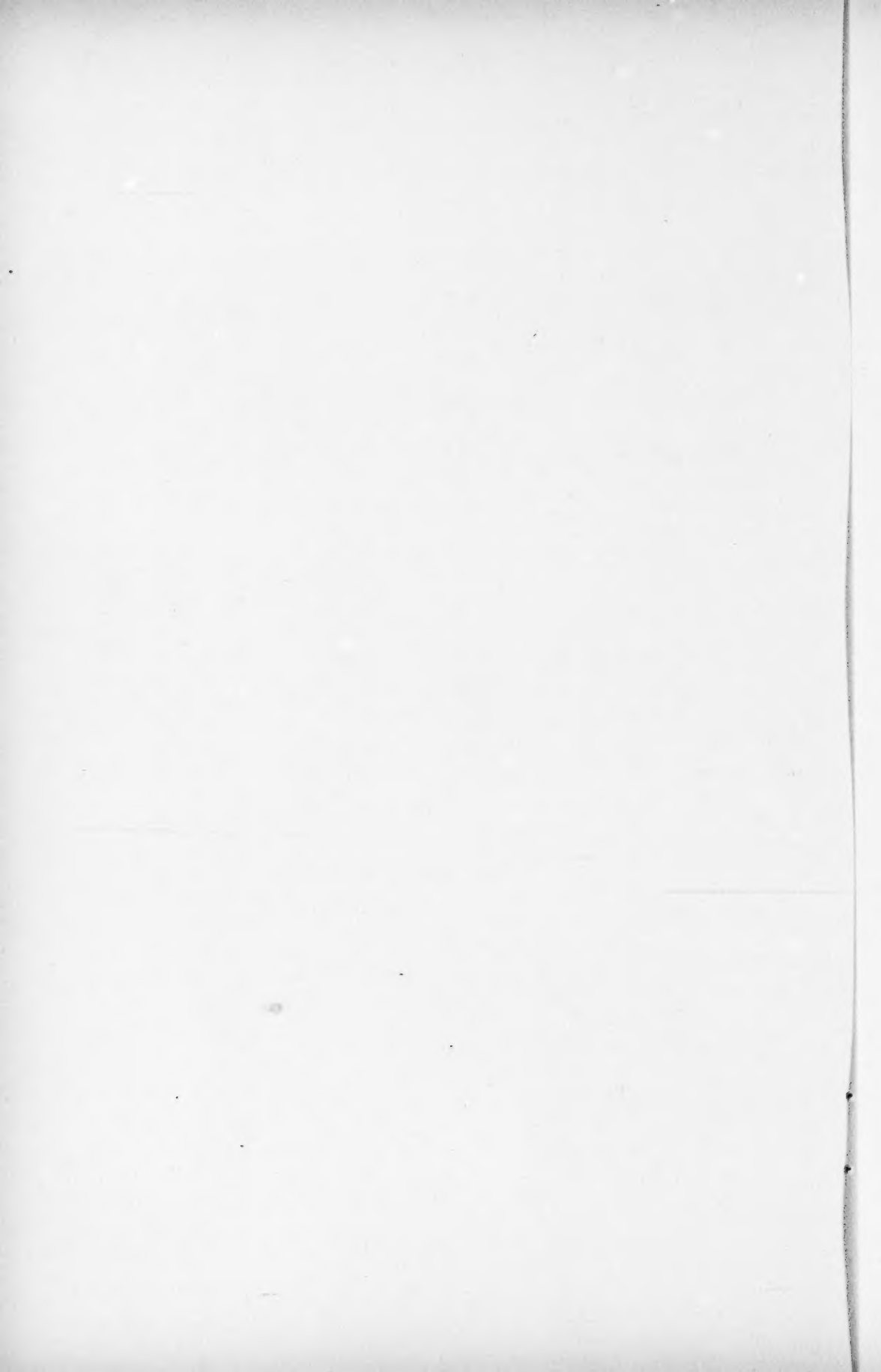


debts. I find these to be marital debts and the parties jointly responsible. These funds were used for marital living expense and upkeep on the property while the parties have been separated. The following unsecured loans were taken out by Mr. Allen to maintain the lavish style of living the Allens enjoyed:

\$30,000.00	- Mr. Duncan
16,400.00	- Mrs. Masters
3,000.00	- Mrs. Masters
<u>4,850.00</u>	- Bankers Trust
\$54,250.00	

Also, there are a number of debts for household expenses due as follow:

\$641.26	- Exxon
200.00	- Westgate Family
216.76	- Boone Refrigerator
158.44	- Ford's Drug
236.00	- Dr. Jabbour
144.06	- Lowe's
150.00	- Visa (Closed)
250.00	- Visa (Current)
181.37	- Amoco
140.00	- Gulf



649.60 - Ins. (C.W.S.)
233.14 - Southern Bell
600.00 - Southern Bell

These must be paid before a distribution of assets. I find no liquid assets of the parties available to satisfy these obligations. These must be paid before the property can be divided.

7. I find the when Mrs. Allen has received the proceeds of sale of the marital home as hereinafter set out, and the contents therein she will have realized approximately fifty percent of the value of all equity in the marital property to which she is entitled to an equitable interest.

E. ON THE ISSUE OF ATTORNEY FEES

Respondent seeks payment of her attorney fees from Petitioner. Counsel for Respondent have submitted to the Court itemized statements



setting out the hours each have worked on this case. Mr. Hagins has worked eighty two hours and Mr. Wilkins fifty two hours. The Court recognizes these attorneys as experienced trial lawyers. They have had to interview numerous witnesses and prepare a wide range of documents to present to the Court. Petitioner has attempted to portray the handling of the case by two competent, experienced attorneys as "double teaming". However, I find that they helped, rather than delayed the process of the trial. While one attorney was questioning a witness, the other would be out of the Courtroom preparing the next witness to testify. Only during most of the Petitioner's case were both attorneys present in the Court. They had a difficult case to prepare and try.

They presented the defense and counterclaim with vigor and expertise. They are entitled to a reasonable fee for their services. I find that in addition to what they may charge Mrs. Allen, that the Petitioner shall pay a portion of the total fee to Respondent's counsel in the amount of Eight Thousand (\$8,000.00) Dollars, payable as hereinafter set out:

Based upon the statutory and case law of the State of South Carolina I make the following:

CONCLUSION OF LAW

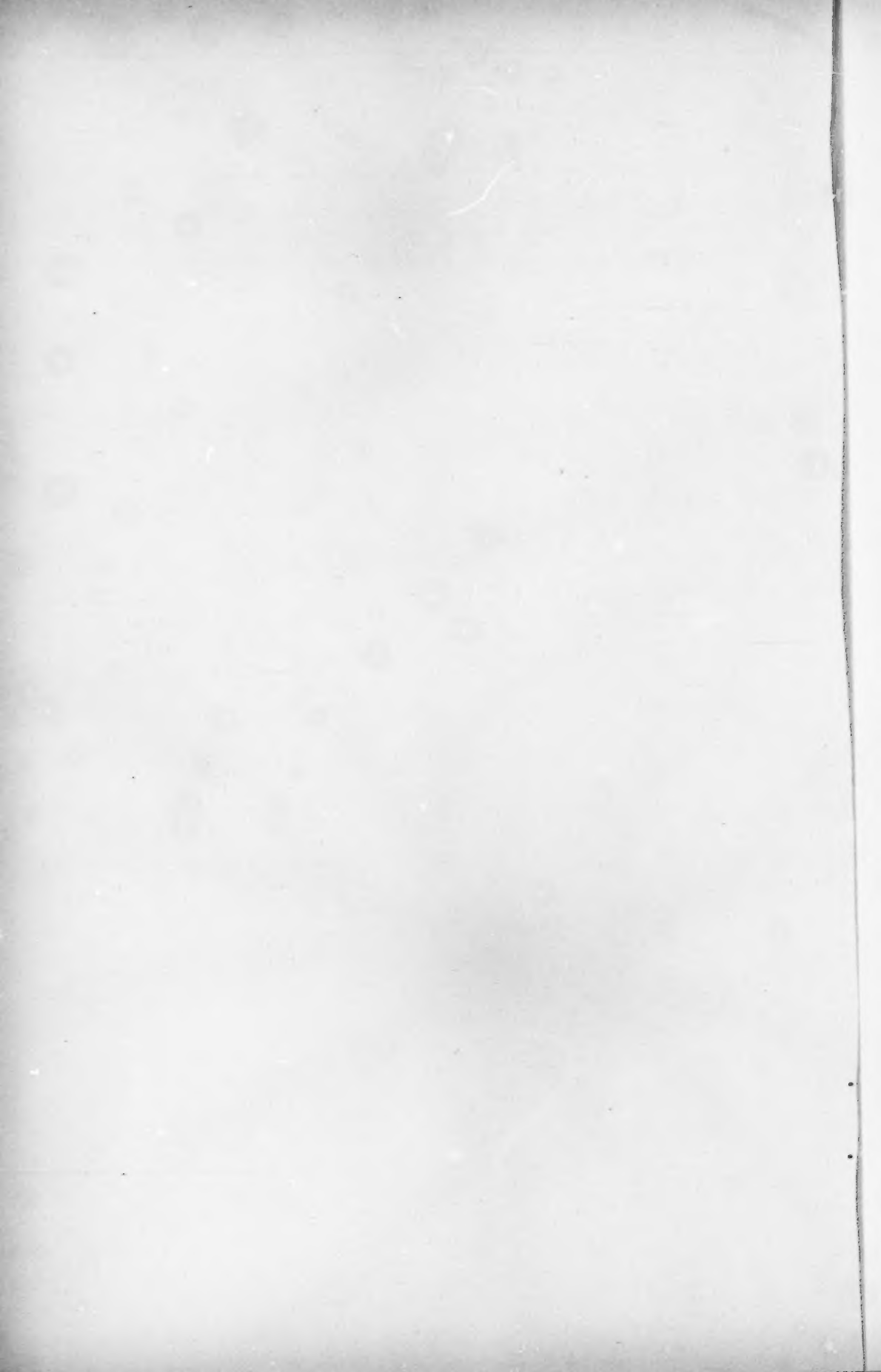
1. That jurisdiction exists over the parties and the subject matter, that all parties are properly before the Court, and the proceedings are regular in every particular.

2. Adultery must be established by



a clear preponderance of the evidence. Odom vs. Odom, 248 S.C. 144, Lee vs. Lee, 237 S.C. 532. Even though Respondent denied the adultery, the private investigators found her in the presence of the named paramour on two occasions where they identified the time, place and circumstance, see DuBose vs. DuBose, 259 S.C. 418. This case is distinguished from Fox vs. Fox, Smith's Advance Sheet No. 7 (1982), Page 10 where the private investigator never saw the husband and purported lover together. Also, the Respondent and her lover were not neighbors giving rise to casual meetings as in Fox id.

3. Upon equitable dividing property the Judge may consider the debts of the parties. Levy vs. Levy, Smith's Advance Sheet No. 15 (1982)



page 7. Where the debts are for the maintenance of the properties and living expenses which both parties shared the enjoyment and benefits therefrom, I conclude it is proper for both parties to share in satisfying the debts. Inter-spousal gifts are subject to equitable distribution. Burgess vs. Burgess, Smith's Advance Sheet No. 2 (1982) page 6.

4. The Court does not ordinarily approve divided custody. There are in this case exceptional circumstances and strong and convening reasons to do so. See Mixson vs. Mixson, 253, S.C. 436. The Court has endeavored in this case to apportion the custody so there is no shifting and shuttling back and forth between the parents so as to create confusion and interfere with the proper training and discipline of



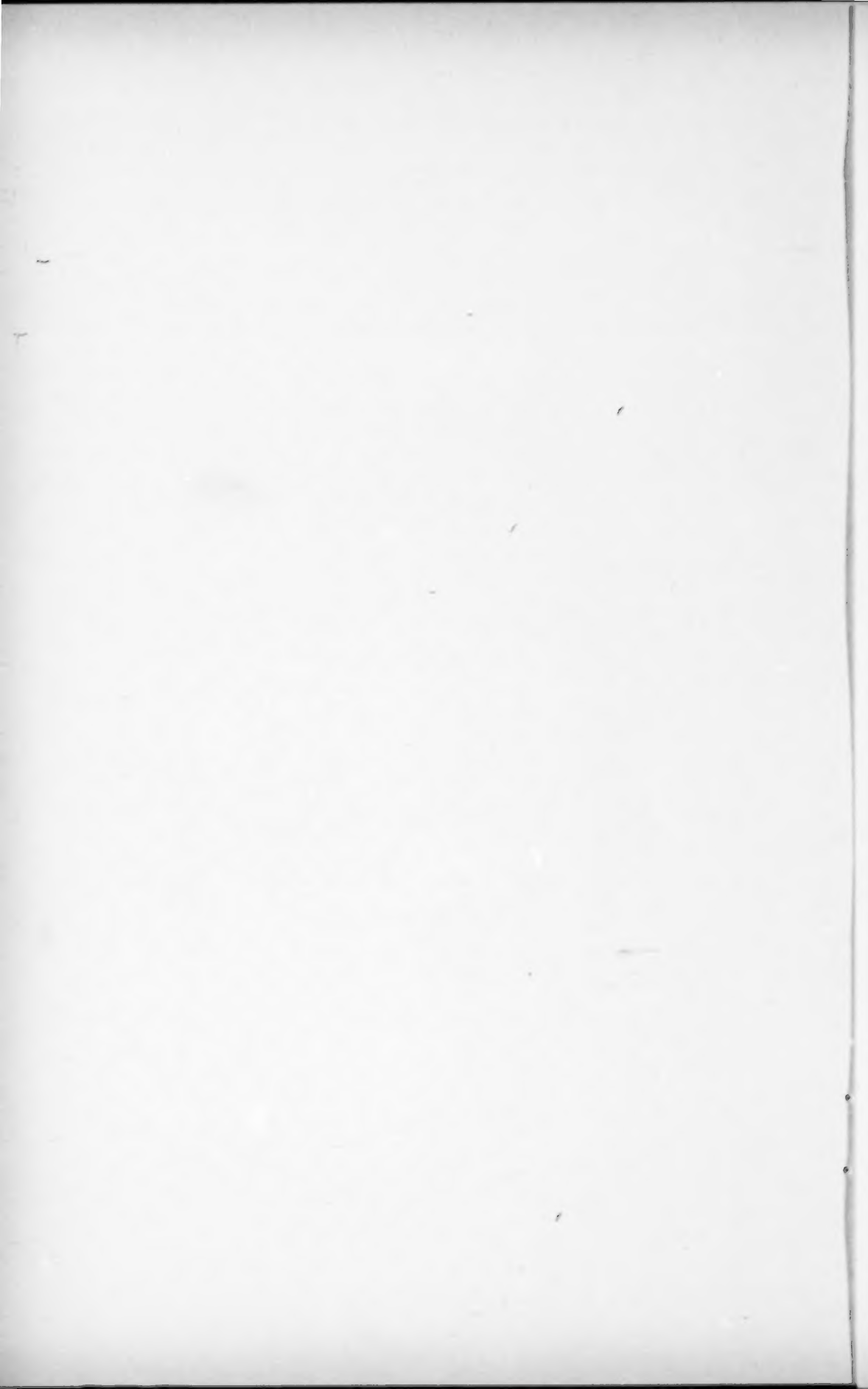
the child. Kenneth A. Avin et. al. vs Avin, 272 S.C. 514. As always, the Court has as its controlling consideration the welfare of the child and what is for their best interest. Ford vs. Ford, 242 S.C. 344.

5. That by the facts of this case to the law of this state, the foregoing finds are appropriate.

THEREFORE, based upon the foregoing findings and conclusions, it is accordingly,

THE JUDGEMENT OF THE COURT

1. Petitioner is awarded an absolute divorce, A Vinculo Matrimonii, from the Respondent upon the ground of adultery. The marriage heretofore entered into between the Petitioner and the Respondent be and the same is hereby set aside, terminated and dissolved.



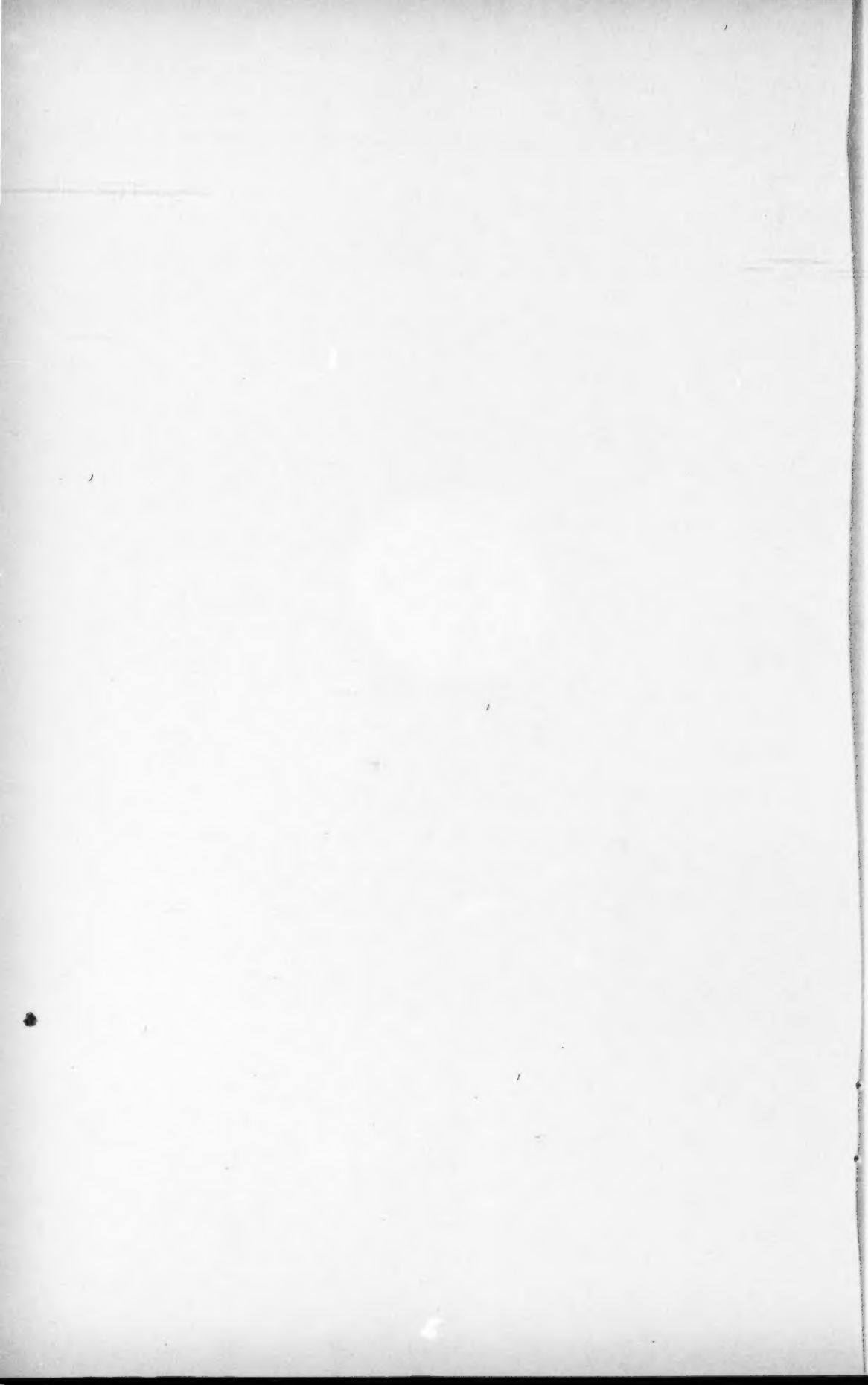
2. Respondent is barred from alimony.

3. Petitioner shall have custody of his daughter as follows:

a. For one week during Easter each year from Friday proceeding Palm Sunday at five o'clock p.m. until Easter Sunday at seven O'clock p.m.

b. For one week at Thanksgiving each year, from five o'clock p.m. the Friday before the week of Thanksgiving until seven o'clock p.m. Sunday after Thanksgiving.

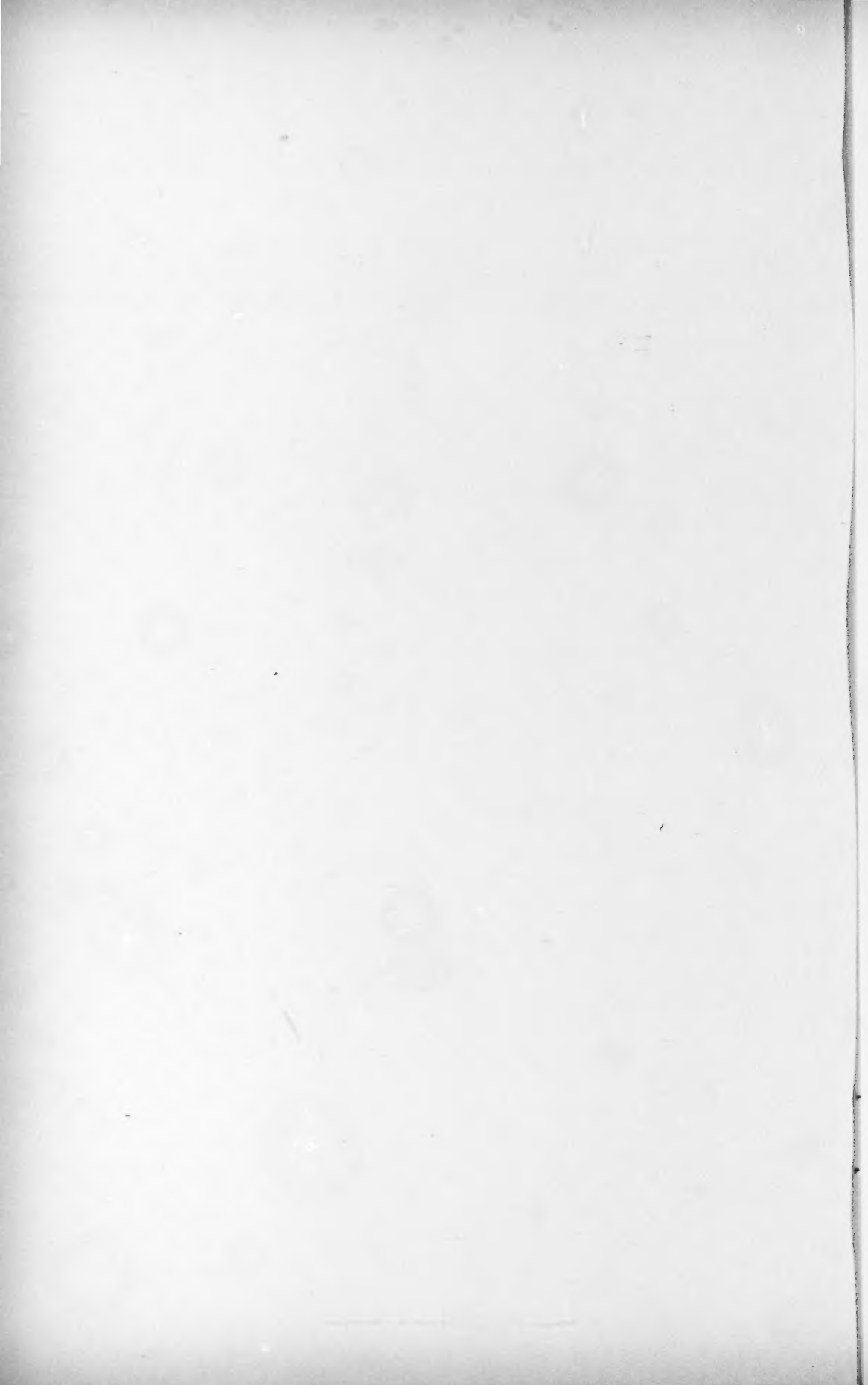
c. For 1983, from five o'clock p.m. on the last day of school in December before Christmas vacation until twelve o'clock noon on December 26. For 1984, from twelve o'clock noon on December 26 until seven o'clock p.m. the evening before the school term begins in January 1985.



Each year thereafter, the parents will alternate the week of Christmas and the week following in like manner.

d. Each year from five o'clock p.m. the first Sunday in June after school recesses for the summer vacation until seven o'clock p.m. on the Sunday the week before school begins in the fall. The Respondent shall have custody the balance of the time.

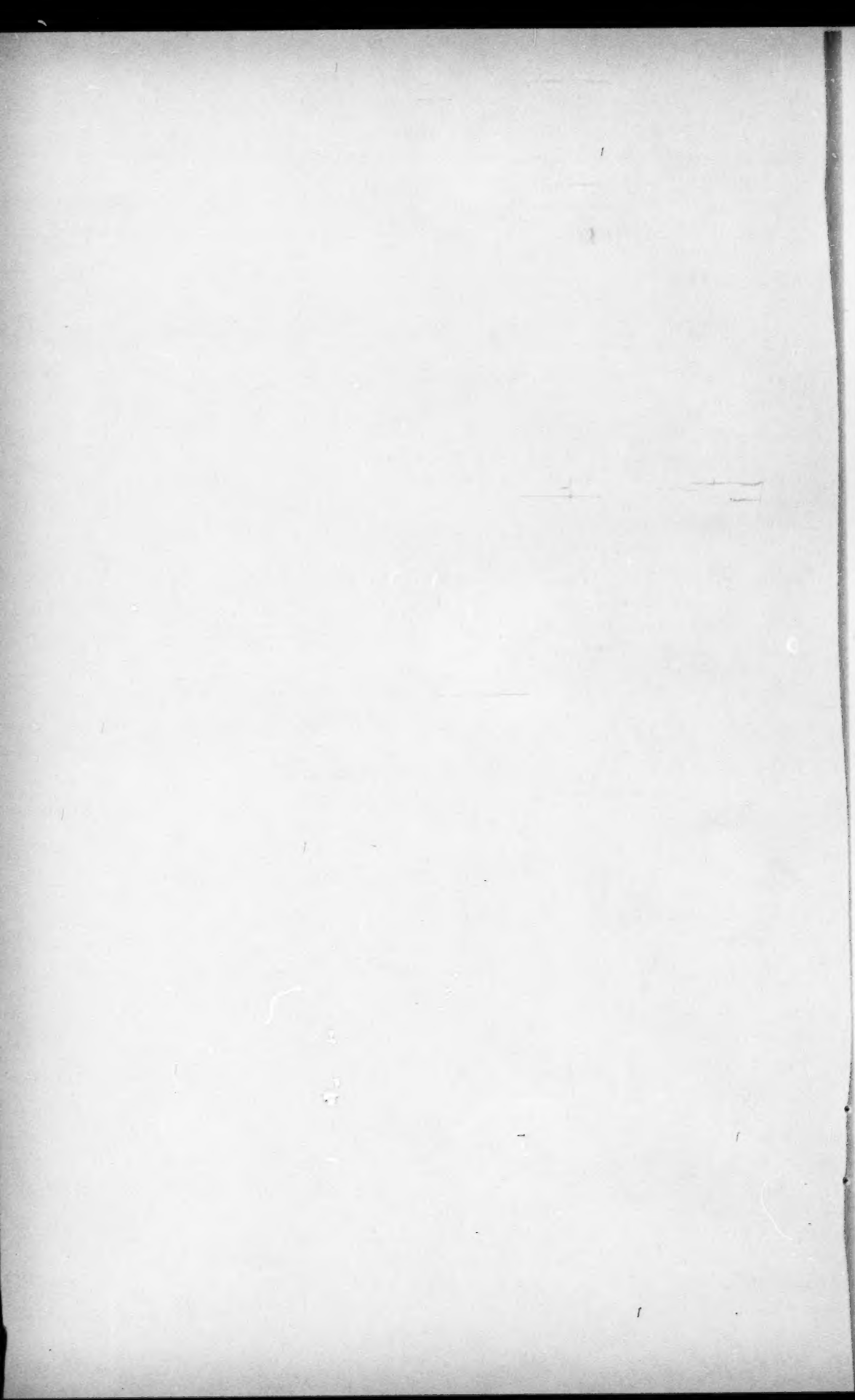
The Petitioner shall have the right to have his daughter with him from five o'clock p.m. on Friday until seven o'clock p.m. on Sunday; the first weekend in October; the first weekend in November; the fourth weekend in January; the fourth weekend in February; the fourth weekend in March and April, whichever month does not have Easter week. In other words,



either weekend in March or April but not both. From nine o'clock p.m. on the second Saturday in September and May.

The Respondent shall the right to have her daughter visit with her for one week from five o'clock p.m. on the Friday before the week of July 4 until seven o'clock p.m. on Sunday following July 4. That is to say at least ten days. And any other times the parties agree. The parties are strictly directed to keep the other informed of any illness or accidents of the child. They shall not phone the child while she is with the other parent but the child shall be allowed and encouraged to call the non-custodial parent at least weekly.

During the period of time the child is in the custody of the mother, the



Petitioner shall pay to her the sum of Fifty (\$50.00) Dollars per week for her support.

4. a. The parties shall immediately list the marital home at 528 Sherwood Circle, for sale. If there is no buyer, either public or private, by May 1, 1983, the property shall be sold at public auction by the Clerk of Court, after advertising as required in mortgage foreclosures, on sales day in June 1983. From the proceeds of the sale the following shall be paid: any costs of sale, the mortgage balance due, the principle on the notes together with any interest to: Mr. Duncan in the amount of Thirty Thousand (\$30,000.00) Dollars, Mrs. Masters in the amount of Nineteen Thousand Four Hundred (\$19,400.00) Dollars, Bankers Trust in the amount

of Four Thousand Eight Hundred and Fifty (\$4,850.00) Dollars; the creditors listed in Paragraph 6 and 9; Eight Thousand (\$8,000.00) Dollars as attorney fees to Mr. Hagins and Mr. Wilkins. (This shall be the portion of attorney fees, due to counsel for Respondent on behalf of the Petitioner.) The balance of the proceeds shall be payable to Mrs. Allen in full settlement of all of her interest in and to any marital property, real or personal. However, should the proceeds of sale remaining be less than Fifty Thousand (\$50,000.00) Dollars, the Petitioner shall, within ninety days of the close of the sale, pay unto the Respondent the balance required to equal Fifty Thousand (\$50,000.00). Should the proceeds remaining be more

then Fifty Thousand (\$50,000.00) Dollars, Mrs. Allen shall be entitled to all of the excess. The property shall be listed for sale at not less than Two Hundred Thousand (\$200,000.00) Dollars. At any public sale the bidding shall start at One Hundred Seventy-five Thousand (\$175,000.00) Dollars.

However, should Mrs. Allen elect to maintain the marital home, as her equitable portion of the marital property, listed above she may do so by satisfying the notes, paying off the creditors, her attorney fees and assume payment of the mortgage of the home. She must elect to do so within ten days of the date of this Order. If she so elects, the Petitioner shall, immediately upon proof of satisfaction of the aforesaid notes,



creditors and attorneys fees, cause to be made, execute and deliver a general warranty deed conveying full title unto Mrs. Allen. Otherwise she shall vacate the premises within thirty days of the date of this Order and the house shall be listed and sold. Mr. Allen shall make the mortgage payments due thereon until the sale. He shall have no other obligation for any utilities in the home after March 1, 1983.

b. The lake house, and law office shall be sole property of the Petitioner and he shall be responsible for the mortgage payments thereon.

5. The Petitioner shall pay over to Respondent the sum _____ for the costs incurred by her in preparing her claim for the property distribution.



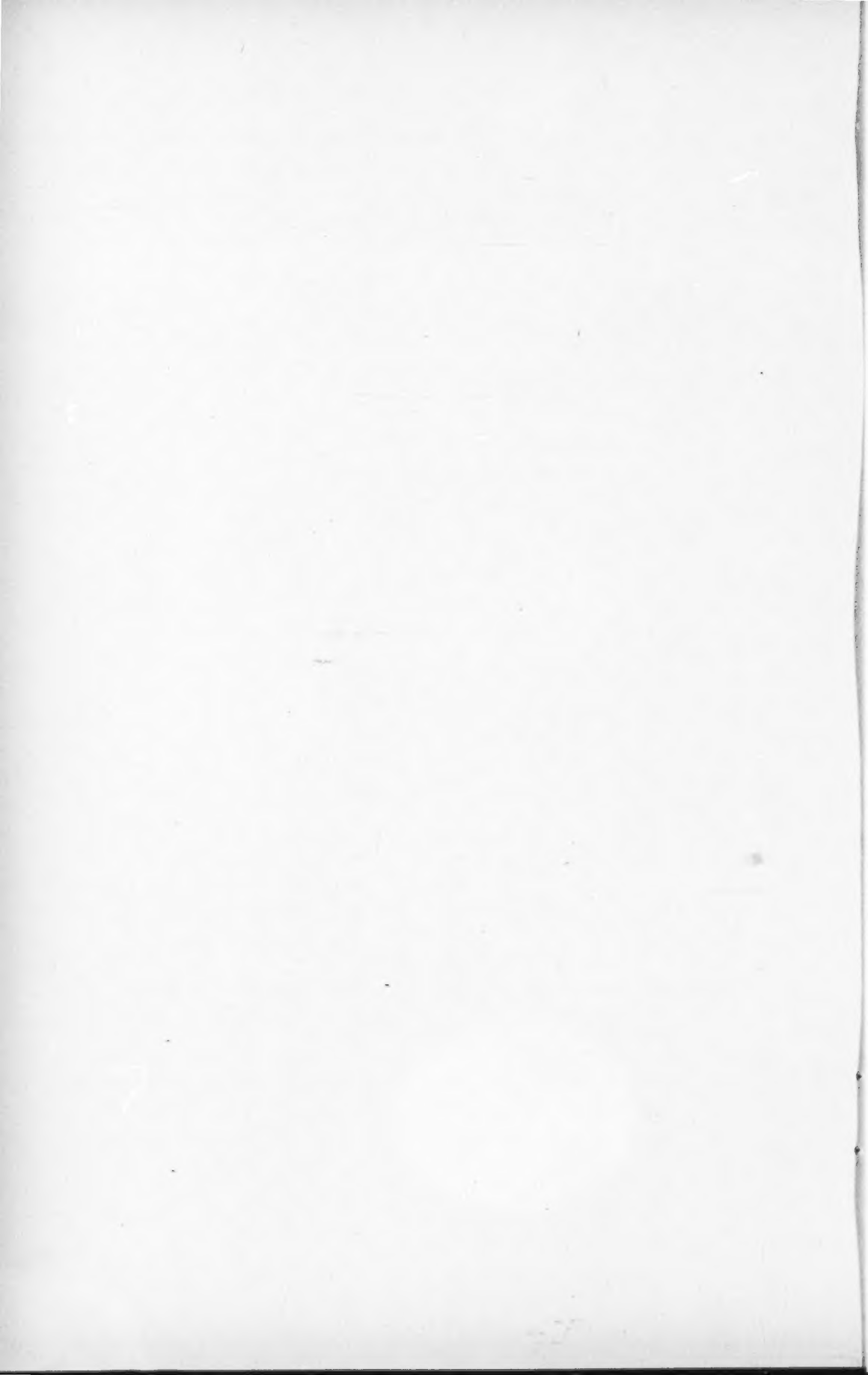
6. That the transfer set forth above shall be complied with by the parties.

7. That the directives in the above findings are hereby made Orders of this Court.

IT IS SO ORDERED.

S/Joseph W. Board
JOSEPH W. BOARD,
JUDGE, THE FAMILY
COURT, SEVENTH
JUDICIAL CIRCUIT

January 24, 1983
Spartanburg, South Carolina



STATE OF SOUTH CAROLINA,)
) IN THE
COUNTY OF SPARTANBURG.) FAMILY
) COURT

SPARTANBURG COUNTY)
DEPARTMENT OF SOCIAL)
SERVICES,)

Petitioners)

vs.)

ORDER

Franklin W. Allen and)
Jean Allen,)

Respondents.)

IN THE INTEREST OF:)
Amanda Jean Allen,)
DOB: 6/21/77)

C.A. No. 84-DR-42-2571

This matter was heard by the undersigned on November 13, 1984, in the Spartanburg Family Court. It appears from the record that the minor child Amanda Jean Allen was taken into emergency protective custody by a city police officer on November 4, 1984. The Spartanburg County Department of Social Services (DSS) filed its petition for removal alleging sexual



abuse of the child by Mr. Allen on November 5, 1984, and this pretrial hearing was scheduled pursuant to §20-7-610(D) of the Code of Laws of South Carolina.

Respondent Franklin W. Allen appeared at the hearing represented by his attorney, Richard Vieth. Respondent Jean Allen was also present along with her attorney Harry A. Chapman. Jim S. Brooks, attorney at law, has been duly appointed as guardian ad litem for the child and was present at this hearing. The Petitioner was represented by Virginia W. Batson, attorney from the Office of the General Counsel of the South Carolina Department of Social Services, acting as representative of the Seventh Judicial Circuit Solicitor's Office.

Testimony was received and based upon that testimony and the record before me I find that:

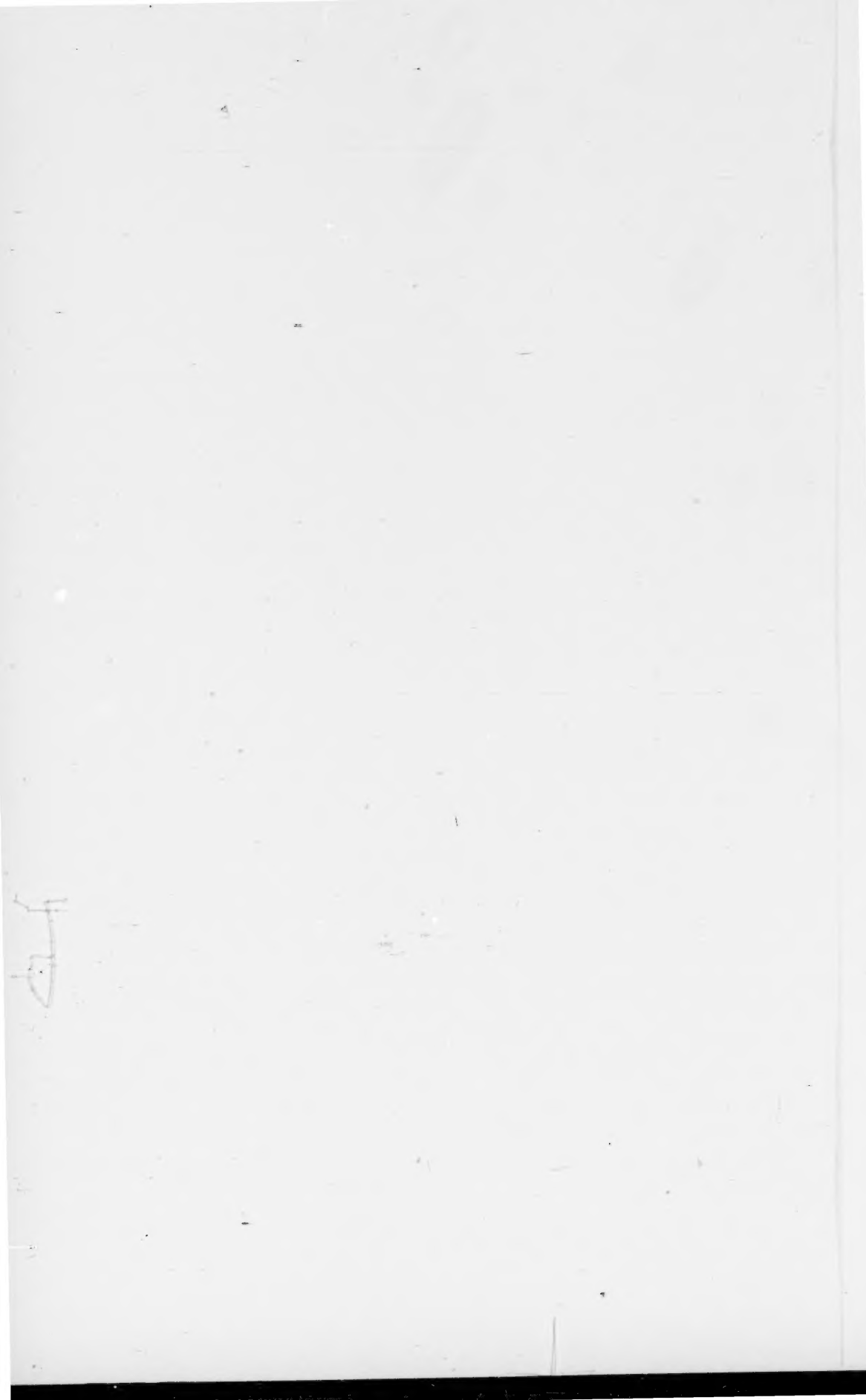
1. On November 2, 1984, city police officers were dispatched to Med Central following a report of possible sexual abuse of a minor child. Investigating the matter, they talked to Dr. Austin McElhaney who had examined the child. He reported that he had found bruising, irritation, and puffiness in the vaginal area and that the hymenal ring was open and approximately one centimeter. Upon questioning by Dr. McElhany, the child related to him that her father had touched her in that area with his fingers. Mrs. Allen stated that the child had told her also that her father had touched her vaginal area and that she had detected the bruise

following Amanda's complaint to her of pain while voiding. The child was examined by a second physician who confirmed the bruising. DSS was notified and also began an investigation on November 2, 1984, at Med Center. Amanda stated to the caseworker that her father had threatened to "whip her or beat her up" if she told anyone he had touched her and that it had actually happened on numerous occasions. Based upon the child's statements and the doctor's findings, the law enforcement officers made a preliminary determination that the child would be at risk of harm from sexual abuse by her father if returned to his custody.

2. The Respondents are divorced and Mr. Allen was awarded custody of the minor child. During the weekend

of November 2 - 4, she was visiting with her mother and the police officers decided that Amanda would not be at risk if allowed to remain in her mother's care until the scheduled termination of the visit on November 4, 1984. On that day, another statement was taken from Amanda by the police confirming her previous story and she was taken into emergency protective custody and turned over to DSS.

3. I find that based on medical evidence before them, the statements of the child, the child's age, and the lack of another adult in the custodial parent's home who might provide protection, the Spartanburg Police had probable cause to believe that emergency action was necessary to protect Amanda from harm.



4. DSS has placed the minor child at the Spartanburg Children's Shelter and reports that she has adapted well to placement there. I find that custody of the minor child should remain with DSS pending a hearing on the merits. Interim placement at Spartanburg Children's Shelter appears to be in the best interest of the child since there she is not only protected from the alleged abuse but she is not subject to influence or pressure on behalf of either parent. Additionally, the child appears to have achieved a certain emotional stability in this placement which the Court should decline to disrupt prior to the merits hearing.

5. Mr. Brooks has expended 14 - 15 hours in investigating this case already and has done an extraordinary

job. This finding is made a part of the record for consideration by the Court upon the hearing on the merits since it is not appropriate to order a guardian's fee at this time.

6. Pending a hearing, both parents should be allowed visitation with the child. Each parent shall be entitled to visit once a week for a period of two to three hours. Visits should be supervised by DSS and should be scheduled at DSS's convenience.

IT IS THEREFORE, ORDERED:

1. Temporary custody of the minor child Amanda Allen shall remain with DSS with placement continuing at the Spartanburg Children's Shelter.

2. Each Respondent is entitled to visit with the child once each week for a period of two to three hours. Visitation shall be supervised by DSS



and shall be scheduled at DSS's convenience.

AND IT IS SO ORDERED.

CERTIFICATE

I verily believe that the foregoing Order is in compliance with the requirements of Rule 27-C of the Rules of Practice for the Family Court.

s/ Judge R. Kinard Johnson, Jr.
Judge R. Kinard Johnson, Jr.

Greenville, South Carolina

Date: November 23, 1984



IN THE FAMILY COURT

O R D E R

Docket #84-DR-42-2511

The above captioned matter was heard by the undersigned on January 17, 1985, in the Family Court for Spartanburg County. The Spartanburg County Department of Social Services (DSS) initiated this action by filing its Petition for Removal on November 5, 1984, pursuant to §20-7-736 of the Code of Laws of South Carolina (1976), as amended, hereinafter referred to as "the Code." The Petition alleged that the minor child Amanda Jean Allen had been sexually abused by her father, Franklin W. Allen; that she had been taken into emergency protective custody by Spartanburg City Police on November 4, 1984; that she should be placed in custody of DSS; and that Respondents should be required to pay



support for the child.

Respondent Jean Allen filed an Answer, which upon motion of her attorney Harry A. Chapman with the consent of the other parties, was amended to be designated "Answer and Counterclaim", alleging that Mr. Allen sexually abused the minor child; that visitation of the child with her father should be under supervision of DSS and should not occur unsupervised until he has undergone psychiatric treatment; that custody of the child should be awarded to Mrs. Allen; and that Mr. Allen should be required to pay support for the child. Respondent Franklin W. Allen also filed an Answer and Counterclaim alleging that the Order of Judge William K. Charles, Jr. in the case of Franklin W. Allen v. Jean W. Allen, dated September 28,



1984, is res judicata as to all issues then litigated; that Jim S. Brooks should be replaced as Guardian ad Litem, or that a second Guardian should be appointed to assist him; that he denies the allegations of sexual abuse; that he is unable financially to pay child support; that he has been arrested on a warrant criminal sexual conduct, first degree; that the minor child should be subjected to additional examination by a trained hypnotist and/or child psychiatrist; that he should be awarded attorney's fees and costs; that custody should be returned to him; and that Respondent Jean Allen should be required to pay child support to him.

At a pre-trial hearing on November 13, 1984, Judge R. Kinard Johnson,



Jr., determined that there was probably cause for the emergency action taken by the city police. Custody was awarded to DSS pending a hearing on the merits. Judge Johnson's Order also provided for weekly supervised visitation of the parents with the minor child.

The hearing on the merits of this matter was scheduled for December 4, 1984, but was continued on motion of Richard W. Vieth, attorney for Mr. Allen. Subsequently, the parties entered into a Consent Order dated December 28, 1984, allowing DSS to retain custody of the minor child until a merits hearing might be scheduled before a visiting judge, since each of the Spartanburg Family Court Judges has recused himself in this case.



Present before me for this merits hearing on January 17, 1985, were Respondent Jean Allen with her attorney, Harry A. Chapman, Respondent Franklin W. Allen with his attorneys, Richard W. Vieth and Toney J. Lister, Virginia W. Batson attorney for Spartanburg County Department of Social Services, and Jim S. Brooks, attorney and Guardian ad Litem for the minor child, Amanda Jean Allen. Upon consideration of the testimony presented, the exhibits, the Guardians recommendations, the pleadings, and the record before me, I find by a preponderance of the evidence:

1. This Court has jurisdiction over the parties and the subject matter.

2. Amanda Jean Allen, born June 21, 1977, is the daughter of the



Respondents, Franklin W. Allen and Jean Allen.

3. The Respondents were divorced by Order of Judge Joseph W. Board dated January 24, 1983. This Order also provided for divided custody of Amanda.

4. Judge William K. Charles subsequently found that changed circumstances warranted a change in custody and awarded sole custody of Amanda Jean Allen to Franklin W. Allen by his Order dated September 28, 1984. Mrs. Allen was granted certain visitation periods.

5. On November 2, 1984, at the beginning of the weekend's visitation period, Amanda complained to her mother of discomfort during urination and stated that her father had hurt her. Mrs. Allen took her to Med



Central, an emergency medical facility, where the child was examined by Dr. Austin McElhaney. The child told him that her father had "hurt her bottom" and had put his fingers there. Subsequently, she was transported to Spartanburg General Hospital's Emergency Room where Dr. D. M. Kraebber examined her. Both doctors provided corroborative evidence in their testimony and I find that there was a bruise on the right side of the mons pubis, approximately the size of a man's fingertip or thumb, and that there was redness and irritation were identified as not being related to disease or infection. Dr. McElhaney testified that the characteristics of the bruise and the irritation would be consistent with the genital area's having been manipulated. Further



corroboration was provided by the testimony of Betsy W. Burns, formerly a caseworker employed by DSS, who was duly qualified as an expert in cases of child sexual abuse. Ms. Burns, who has interviewed the child, identified numerous indicators consistent with dynamics present in families in which child sexual abuse has occurred. Based on their investigation, DSS founded the case for sexual abuse. Psychologist Dr. Luther A. Diehl testified and I find that the minor child is intelligent, has an adequate understanding of the difference between the truth and falsehood, is capable of accurate perception of such an incident and is sufficiently articulate to report such an occurrence accurately. Officer Roger Shultz and Ms. Burns testified that



the child's statements concerning the abuse have been consistent factually. I interviewed the minor child in the presence of the attorneys and the Guardian Ad Litem as provided for in Family Court Rule 14. The attorneys were permitted to submit questions to me for the child. Based upon all of the foregoing, I find that a preponderance of the evidence establishes that the minor child, Amanda Jean Allen, has been sexually abused by her father, Franklin W. Allen, in that he placed his fingers in the vaginal area and manipulated the exterior genitalia. This action constitutes harm to the minor child as defined in §20-7-490(c)(2) of the Code. I additionally find that the minor child cannot be protected from further harm without being removed



from her father's custody pursuant to §20-7-736 of the Code. Since I find that the necessary preponderance of evidence has been presented at this hearing, there is no need for an Order of this Court requiring additional psychiatric testing or hypnosis of the child.

6. The Department of Social Services proposed the following plan for placement and treatment of Amanda and presented it to the Court for approval as required by §20-7-764 of the Code.

a. The child shall be placed in the home of her mother, Respondent, Jean Allen, with supervision of the placement by DSS for a period of six months. The agency will maintain at least weekly contact with the child and/or Mrs. Allen.



b. The parents and DSS have agreed upon a counseling program and Amanda has attended one session. Initially, the program calls for individual counseling for Amanda. Eventually, joint counseling of Amanda with her mother will begin. Mr. Allen's participation shall begin with individual counseling and later shall include joint counseling with Amanda. Each parent has agreed to bear one half of the cost of this counseling.

c. DSS will arrange for and supervise visitation of Mr. Allen with Amanda twice each month for one to two hours. It will be Mr. Allen's responsibility to contact DSS to initiate these arrangements. The number of friends and relatives Mr. Allen brings along for these visits should be limited to four or five

unless he makes prior arrangements with DSS. The child will not be required to visit with her father during the visitation periods immediately preceding or during the trial of the criminal matter.

7. To reach my decision approving this plan, I have considered the Orders of Judge Board and Judge Charles in Allen v. Allen, the testimony presented by DSS, and the testimony of Doctor Edwin O. Byrd, Jr., a minister who testified on behalf of Mr. Allen recommending that placement not be with Mrs. Allen. Judge Charles' Order found Mrs. Allen's values and morality questionable and particularly identified her failure to encourage a good relationship between Amanda and her father as significant in his



conclusion that Mr. Allen's home was the more suitable environment for the child. While Judge Charles' findings are binding as to the issues raised there, the evidence presented here today mandates that those findings are not controlling of the disposition of this case. I believe that the plan for supervision and counseling recommended by DSS responds adequately to the concerns raised in the previous hearings about placement with Mrs. Allen. Further supporting the plan for placement there, DSS submitted into evidence a home study recently prepared on Mrs. Allen in connection with another matter. This home study and testimony revealed that Mrs. Allen's home is suitable physically and that it is a familiar environment for Amanda. This child has been in



the Spartanburg Children's Shelter since November 4, 1984, except during her Christmas vacation which was spent at her mother's home. She has a non-abusing parent available whose home has been identified as suitable for placement and who has petitioned the Court for return of the child. Amanda's best interests would be served by reuniting her with a loving parent rather than continuing her placement in foster care. Dr. Diehl also testified that Amanda's emotional health would benefit from being placed with someone who is supportive of her statements concerning the abuse. The change in circumstances created by the abuse and the removal of custody requires that Judge Charles' Order concerning visitation be modified. The visitation program and its



limitations are reasonable and in Amanda's best interests. The previous Order required that Mr. Allen provide for counseling for the parties and Amanda. The parties have agreed to modify that Order as to the counselor's fees and I find that it is reasonable for the parents to share the cost equally. Additionally, the counseling program initiated here is in accord with the testimony of Dr. Diehl. He stated that Amanda is not mentally ill and so does not require treatment by a psychiatrist. He also recommended a similar program of individual and joint counseling with a psychologist and emphasized that Mr. Allen should be involved. I approve DSS's plan for placement, visitation and counseling and caution that any violation of the visitation provisions



or failure to participate in counseling will result in notice to the Court by DSS.

8. Based on his own investigation of this matter, Mr. Brooks concurs with the recommendations of DSS and states that Amanda's best interests would be served by removal of legal custody from Mr. Allen and continuing legal custody with DSS. Mr. Brooks shall submit a statement to the Court detailing his time spent on this case. Based on that statement, I shall issue a supplemental Order making the required findings of fact and awarding him an appropriate fee pursuant to Family Court Rule 51, and South Carolina Department of Social Services v. Hyatt, 277 SC 152, 283 SC 2d 445 (1981). I find that Mr. Brooks' participation in this hearing has been



extensive and that he has represented the child's interests consistently well. Early in the hearing, I heard Mr. Allen's counsel on their motion that Mr. Brooks be relieved as Guardian or that a second Guardian be appointed to assist him. The basis cited for this motion was that Mr. Brooks had concluded that the child's statements concerning the abuse were accurate. I find that reaching such conclusions is part of the function of the child's Guardian ad Litem and no cause has been shown to grant the relief sought.

9. I find that in view of the findings today Mr. Allen is not entitled to an award of attorney's fees, costs or child support. I also find that a determination concerning child support for Mrs. Allen should

not be made until such time as legal custody is actually returned to her. DSS has waived a determination of support at this time.

10. It would be in the best interests of the minor child for the Court's record in this matter to be sealed and opened only upon Order of the Court for good cause shown. The parties and all witnesses in the courtroom have been reminded of the confidential nature of the proceedings herein and that any breach of confidentiality will result in their being found in contempt of Court.

IT IS THEREFORE ORDERED:

1. Custody of the minor child, Amanda Jean Allen, is removed from Respondent, Franklin W. Allen, and awarded to the Spartanburg County Department of Social Services. Mr.



Allen shall turn over to that agency all clothing and personal belongings of Amanda which might be in his possession.

2. All parties shall cooperate with DSS in the treatment plan set out below:

a. Individual and joint counseling shall be provided for Amanda, Mrs. Allen and Mr. Allen according to the therapist's recommendations. Mr. and Mrs. Allen shall each be responsible for payment of one-half of the cost of this counseling. DSS shall monitor participation in counseling and shall be entitled to receive necessary reports.

b. Amanda shall be placed in the home of Mrs. Allen and that placement shall be supervised by DSS for a period of six months through at least



weekly contacts with Amanda and/or Mrs. Allen.

c. Mr. Allen shall be entitled to twice monthly visitation with Amanda. This visitation shall be supervised by DSS and arranged through them. Visits will occur at the DSS office and will include no more than four or five family members or friends at each visit unless alternative arrangements are made and agreed to by DSS in advance of the visit. The duration of each visit will be no more than two hours. Amanda shall not be required to visit during the visitation period immediately prior to or during the criminal trial of the related charges against Mr. Allen.

3. DSS shall report to the Court any non-compliance with the terms of this Order.



4. The Court's record in this case shall be sealed and shall not be opened except upon Order of the Court showing good cause.

5. Mr. Brooks shall submit to the Court a statement so that a determination of an appropriate fee may be made. At that time, I will issue a Supplemental Order.

AND IT IS SO ORDERED.

C E R T I F I C A T E

I hereby certify and verily believe that the above Order is in compliance with the requirements of Rule 27(c) of the Rules of Practice for the Family Court and the State of South Carolina.

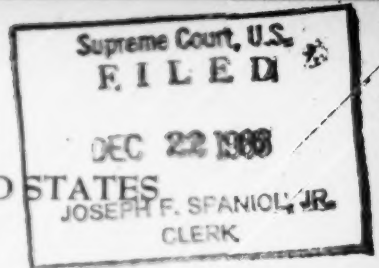
s/ David N. Wilburn, Jr.
David N. Wilburn, Jr.
Family Court Judge of
the Sixteenth Judicial
Circuit

Union, South Carolina

Dated: February 22, 1985.

No. 86-872

2



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

FRANKLIN W. ALLEN,

PETITIONER

VS.

**SPARTANBURG COUNTY DEPARTMENT
OF SOCIAL SERVICES
AND JEAN H. ALLEN,**

RESPONDENTS

**ON PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA**

RESPONDENT'S BRIEF IN OPPOSITION

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59 PL

QUESTIONS PRESENTED

Respondent refers to the Petition for the questions presented.

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Case Number 86-872

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1986

FRANKLIN W. ALLEN,

Petitioner,

versus,

SPARTANBURG COUNTY
DEPARTMENT OF SOCIAL
SERVICES AND JEAN H.
ALLEN,

Respondents.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

CITATION TO OPINIONS BELOW

The Order of the Spartanburg County Family Court is unreported and is reproduced in Petitioner's Appendix C at page 97; however, on page 103 Petitioner omitted a portion of the findings of fact made in the original order. For that reason, we have reproduced their page 103 in our Appendix A, inserting the omitted material. The per

curiam order of the South Carolina Supreme Court affirming the lower court is unreported and is reproduced in the Petition beginning on page 21. The denial of Petitioner's motion for a rehearing is also unreported. The order is reproduced on page 24 of the Petition.

JURISDICTION

The denial of Petitioner's motion for a rehearing was entered by the South Carolina Supreme Court on July 23, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND

STATUTES INVOLVED

1. Petitioner alleges that this case involves the First, Fifth and Fourteenth Amendments to the United States Constitution.

2. The case also involves analysis of §20-7-110 of the Code of Laws of South Carolina (1976), as amended, and Family Court Rule 13. These provisions are set out in

their entirety in Appendix B.

3. According to Petitioner, the case also involves §§15-5-310, 15-5-330, and 15-5-350 of the Code of Laws of South Carolina (1976). However, §15-5-350 covers cases in which a child resides out of state. §15-5-340 is probably the provision intended. These sections are set out in Appendix C.

4. Petitioner argues that §20-7-736 of the Code of Laws of South Carolina (1976), as amended, was unconstitutionally applied. This section is set out in Appendix D. South Carolina Family Court Rule 29 is also reproduced in Appendix D.

5. §20-7-690 (B)(1) of the South Carolina Code is challenged also. It is set out in Appendix E.

6. South Carolina Family Court Rule 26 governs the burden of proof in such cases. It is set out in Appendix F.

7. South Carolina Code §20-7-755 is also involved. The relevant portion of this

section reads:

All cases of children shall be dealt with as separate hearings by the court without a jury... The general public shall be excluded and only such persons admitted as the judge shall find to have a direct interest in the case or in the work of the court...

RESPONDENT'S COUNTERSTATEMENT

OF THE CASE

Amanda Jean Allen is the minor daughter of Franklin W. Allen and Jean H. Allen. The parents were divorced on January 24, 1983. Mr. Allen was given custody of his child on September 28, 1984.

The first report of sexual abuse of this child by Mr. Allen was in May 1984. The child told a school teacher her father had put his hand in her genital area. The Department of Social Services (DSS) investigated the report. During the investigation, Mr. Allen brought Amanda to DSS and both were interviewed. (Trial Tr. pp. 65-66). Ultimately, DSS decided that

sexual abuse had probably not occurred since the contact occurred when Mr. Allen was applying medication to the child. (Trial Tr. pp 64-65, 112, 115-116).

On November 2, 1984, during visitation with her mother, the child reported that she had been hurt by her father and had pain urinating. Mrs. Allen and her parents took Amanda to an emergency medical clinic where she was examined by a physician. Dr. McElhaney found a bruise on the mons pubis, puffiness of the upper labia with mild irritation and redness of the outer labia border. He also found that the vaginal opening was approximately one centimeter wide. The child verified to this doctor that her father had "hurt her bottom". (Trial Tr. pp. 8-28). Amanda was also seen by a second physician at a hospital emergency room. Dr. Kraeber, who was Mr. Allen's witness, did not see an opening in the hymen, but he did observe the bruise and redness of the labia.

(Trial Tr. pp 77-83). Both physicians confirmed that no infection or disease was present.

The first doctor reported the case to the Spartanburg City Police who called DSS. Both agencies began their investigations on November 2, 1986. A caseworker from DSS interviewed the child and she stated that her father had sexually abused her. During several interviews, she told a consistent, detailed story about the incident. She never retracted her story. During the course of her investigation, the caseworker identified numerous social and behavioral indicators considered to be consistent with intra-family sexual abuse. DSS's caseworker was aware of the divorce and the custody battle between the parents, but based on her investigation she concluded that the child had not been coerced or coached to make the statements she had made against her father. (Trial Tr. pp. 42-76).

On November 4, 1984, when she was scheduled to return to her father's home, Amanda was taken into emergency protective custody by the city police. She was placed in a DSS licensed group home for children. DSS filed a petition asking for custody on November 5, 1984. On November 13, 1984, this emergency action was reviewed and approved by the family court. (Petitioner's Appendix B). Custody was continued in DSS until such time as a hearing on the merits might be held. Regular, supervised visitation was allowed to Mr. Allen.

A videotaped interview of the child was conducted jointly by the police and DSS. Mr. Allen's attorney was present in a booth with monitors to observe the interview. (Trial Tr. pp. 75-76).

The merits hearing was twice continued, once on motion of Mr. Allen's attorney, and once by consent of the parties. On January 17, 1985, a hearing on the merits was

conducted before the Honorable David Wilburn, Jr. DSS presented testimony from two caseworkers, a police officer, Dr. McElhaney, and a psychologist. Mr. Allen entered a general denial through his attorney (Trial Tr. pp. 118-119) presented two witnesses, and the two court orders set out in Petitioner's Appendix A as his defense to the action. The family court judge interviewed the minor child in the presence of the attorneys without objection. She related that her father had undressed her, put his hand in her genital area and hurt her. This interview was on the record. (Trial Tr. pp. 108-117). Judge Wilburn concluded that the abuse had been proven by the required preponderance of evidence. Custody was awarded to DSS. A plan for placement with Mrs. Allen, supervision by DSS, visitation for Mr. Allen and counseling for all three was approved.

Mr. Allen appealed the matter to the

South Carolina Supreme Court. The family court's order was affirmed on June 30, 1986. The petition for rehearing was denied on July 23, 1986.

ARGUMENT

Respondent will address each of the questions presented by Petitioner in order with separate arguments.

I

The writ of certiorari should not be granted to review the first question presented by Petitioner for two reasons. First of all, Petitioner offered no objection in the trial court to the procedure used to appoint the child's guardian ad litem. He entered an objection to the individual selected, alleging prejudice, and proposed substitution of another guardian or appointment of a co-guardian. The trial judge concluded that no legal prejudice existed. (Trial Tr. pp. 3-5). The procedure used to appoint the guardian was not

questioned and the family court judge was given no opportunity to consider the propriety of the procedure used. For that reason, the South Carolina Supreme Court refused to consider the question when it was raised on appeal.

In Powers v. City of Aiken, 255 S.C. 115, 177 S.E.2d 370(1970), the South Carolina Supreme Court set out its rationale for requiring an issue to be decided first at the trial level:

This is a court of review. The purpose of an appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. A trial judge will not be reversed for failing to grant a motion on a ground that was not submitted to him. For the guidance of the bar we restate the holding made by this court in many cases heretofore: This court will not grant relief on alleged error asserted for the first time on appeal.

177 S.E.2d at 371

The Federal question was not considered or decided in either the trial court or the

South Carolina Supreme Court. The United States Supreme Court has no jurisdiction under 28 U.S.C. §1257 to consider the constitutionality of the procedure used to appoint the guardian ad litem.

The second reason this question should not be decided by this Court is that it involves interpretation of state court rules and state statutes. South Carolina Code §§15-5-310, 15-5-330, and 15-5-340 all govern appointment of a guardian ad litem in the usual civil case. South Carolina Code §20-7-110 is a separate provision, not requiring notice to a child's legal guardian or parent. Family Court Rule 13 allows a family court judge to appoint a guardian ad litem for a child on petition of either party or the judge's own motion. Again there is no mention of notice. The proper construction of these provisions is a state law question that should be decided first by the state courts. Because it was never properly raised

in this case, it was never decided, by either the family court or the South Carolina Supreme Court. The United States Supreme Court should not grant certiorari to consider such an issue.

II

Certiorari should not be granted to review the second question raised by Petitioner because Mr. Allen did not object to the timing of the hearing in the trial court. He also failed to raise this challenge to the statute in the South Carolina Supreme Court. Since the question was never raised, the state courts have had no opportunity to decide the constitutionality of South Carolina Code §20-7-736 or its application in this case. The United States Supreme Court lacks jurisdiction to consider this question. Cardinale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1161, 22 L. Ed. 2d 398 (1969).

The statute itself provides that a

Respondent may obtain a continuance. Family Court Rule 29 also allows continuances. In fact, this case was continued twice, once on motion of Mr. Allen's attorney and once by consent of the parties; the merits hearing was actually held after the thirty days had run. Mr. Allen could have moved before the trial judge for an order continuing the merits hearing until the criminal matter was concluded, but he did not. Instead, he made a strategic decision to proceed, entering a general denial, putting up his witnesses and submitting into evidence the Allen v. Allen court orders.

Petitioner is trying now to create a constitutional issue the existence of which is not supported by the facts below and which was never considered below. The Petition for certiorari should be denied.

III

Petitioner challenges the constitutionality of South Carolina Code

§20-7-690 (B)(1) of the Code of Laws of South Carolina (1976), as amended. No challenge to the constitutionality of this statute was made in the trial court or the South Carolina Supreme Court. Neither state court has had the opportunity to decide this issue. Therefore, the United States Supreme Court lacks jurisdiction to consider the question on writ of certiorari since the validity of the state statute was not previously "drawn in question" as required by 28 U.S.C. §1257(3).

IV

The Petitioner asserts that the presence of a criminal investigator at the merits hearing violated his right against self incrimination. At trial, Petitioner objected to the presence of the investigator. However, he merely raised a question of the confidentiality of the family court proceedings. His attorney stated he would rather have the investigator wait until the

preliminary hearing in the criminal matter to hear testimony about the abuse. Mr. Allen's attorney conceded on the record that the investigator could get transcripts and expressed no objection to that. (Trial Tr. pp. 6-8). He failed to raise any constitutional objection to the presence of the investigator. He failed to indicate that it would have any effect on his client's decision to testify or not. Therefore, the trial judge did not rule on the federal question Mr. Allen raises in his Petition for writ of certiorari.

Mr. Allen asserted in his argument in the South Carolina Supreme Court that the presence of the investigator precluded him from presenting his case. However, the South Carolina appellate court affirmed the trial court on the basis of state law alone and it did not need to reach the Federal question. The state law relied upon was §20-7-755 of the Code of Laws of South

Carolina (1976), as amended.

The statute provides in part:

All cases of children shall be dealt with as separate hearings by the court without a jury... The general public shall be excluded and only such persons admitted as the judge shall find to have a direct interest in the case or in the work of the court...

Since the decisions of the South Carolina courts rested on an adequate state ground and no Federal question was decided, the United States Supreme Court does not have jurisdiction to review this question. Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L. Ed. 789 (1945).

Ultimately, the question of the presence of the investigator raises some of the same considerations discussed above in the context of the timing of the hearing. Mr. Allen could have asked for continuance of this case until after the criminal proceedings had concluded. Then, the investigator would have had no interest in the DSS case. Mr. Allen

was not compelled to proceed with the investigator present. He simply elected to go forward as a matter of trial strategy.

V

Petitioner's final question would require the United States Supreme Court to undertake a review of the facts of this case already considered twice by South Carolina courts. The trial court found by a preponderance of evidence that Mr. Allen had sexually abused his daughter. The South Carolina Supreme Court affirmed that finding. A comparison of Petitioner's statement of the case with Respondent's and with the family court order reveals that he has presented some of the testimony and proceedings below erroneously. It seems clear that he desires this Court to compare his interpretation of the facts with those found to be true in the lower court and issue a decision somehow exonerating him. This Court should not grant certiorari to review findings of fact. While

the questions of fact in this case are important to the individual litigants, they do not rise to the level of importance that would justify review. United States Supreme Court Rule 17.

CONCLUSION

The child protection laws in South Carolina have been carefully structured to protect the rights of parents while ensuring the safety of the child. Mr. Allen was afforded a timely hearing to review the emergency removal of his child, followed by a full hearing on the merits of DSS's custody petition. He was never denied due process of law. The trial court decided the facts correctly; the South Carolina Supreme Court affirmed its decision, and refused to grant a rehearing. The Petitioner has failed to raise any substantial Federal questions to

merit the granting of the writ of certiorari.
The Petition should be denied.

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Attorney General

Frank K. Sloan
Chief Deputy Attorney General

Bruce Holland
General Counsel

Alice C. Broadwater
Deputy General Counsel

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APPENDIX A

the child was examined by Dr. Austin McElhanev. The child told him that her father had "hurt her bottom," and had put his fingers there. Subsequently, she was transported to Spartanburg General Hospital's Emergency Room where Dr. D. M. Kraebber examined her. Both Doctors provided corroborative evidence in their testimony and I find that there was a bruise on the right side of the mons pubis, approximately the size of a man's fingertip or thumb, and that there was redness and irritation in the area of the inner labia. The redness and irritation were identified as not being related to disease or infection. Dr. McElhaney testified that the characteristics of the bruise and the irritation would be consistent with the genital area's having been manipulated.

APPENDIX B

§20-7-110. Legal representation.

In all child abuse and neglect proceedings:

(A) Children shall be appointed legal counsel and a guardian ad litem by the Family Court. Counsel for the child shall in no case be the same as counsel for the parent, guardian or other person subject to the proceeding or any governmental or social agency involved in the proceeding.

(B) Parents, guardians or other persons subject to any judicial proceeding shall be entitled to legal counsel. Those persons unable to afford legal representation shall be appointed counsel by the Family Court.

(C) The interests of the State and the local child protective services agency shall be represented by the circuit solicitor or his representative in the appropriate judicial circuit in any judicial proceeding.

RULE 13. GUARDIAN AD LITEM

In any matter relating to children, the Court shall upon petition of either party or its own motion appoint a guardian ad litem for said children when deemed to be in the best interest and welfare of the children.

APPENDIX C

§15-5-310. Actions by and against infants and incompetents.

When an infant is a party he must appear by guardian ad litem, who may be appointed by the court in which the action is prosecuted, a judge of probate, a clerk of court, or a master in those counties where the office of master exists. A mentally incompetent person, whether hospitalized or not, shall appear by guardian ad litem in an action by or against him. When an infant or mentally incompetent person is a party in a proceeding before the Industrial Commission of this State a guardian ad litem for such infant or mentally incompetent person may be appointed by a judge of probate, clerk of court or master, if there be a master, of the court wherein such infant or mentally incompetent person resides or by any circuit judge in this State.

§15-5-330. Appointment of guardian ad litem; infant plaintiff.

When an infant is plaintiff the guardian ad litem shall be appointed upon the application of the infant if he be of the age of fourteen years; if under that age, upon the application of his general or testamentary guardian, if he has any, or of relative or friend of the infant. If made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

§15-5-340. Appointment of guardian ad litem; infant defendant.

When the infant is defendant the guardian ad litem shall be appointed upon the application of the infant, if he be of the age of fourteen years and apply within twenty days after the service of the summons. If he be under the age of fourteen or neglect so to apply, then the guardian ad litem shall be

appointed upon application of any other party to the action or of a relative or friend of the infant, after notice of such application shall have been given to the general or testamentary guardian of such infant, if he has one within this State or if he has none, then to the infant himself, if over fourteen years of age and within the State or, if under that age and within the State, to the person with whom such infant resides.

;

APPENDIX D

§20-7-736. Jurisdiction of family court under article; removal proceedings; procedures.

(A) The Family Court shall have exclusive jurisdiction over all proceedings held pursuant to this article.

(B) Upon investigation of a report received under §20-7-650 or at any time during the delivery of services by the agency, the local child protective services agency may petition the Family Court in its jurisdiction to remove the child from custody of the parent or guardian when the agency has probable cause to believe removal is necessary to protect the child's health or welfare.

(C) The petition shall contain a full description of the reasons why the child cannot be protected adequately in the custody of the parent or guardian, including a

description of the condition of the child, any previous efforts to work with the parent or guardian, in-home treatment programs which have been offered and proven inadequate and the attitude of the parent or guardian towards placement of the child in an alternative setting. The petition shall also contain a statement of the harms the child is likely to suffer as a result of removal and a description of the steps that will be taken to minimize the harm to the child that may result upon removal.

(D) Upon receipt of a removal petition under this section, the Family Court shall schedule a hearing to be held within thirty days of the date of receipt to determine whether removal is necessary.

The Family Court shall notify the parent or guardian of the hearing by delivering a copy of the petition, together with a notice of the hearing, which shall include the date and time of the hearing and an explanation of

the right of the parent or guardian to an attorney under §20-7-110. The Family Court shall effect delivery at least twenty-four hours prior to the hearing. The respondent shall be allowed to seek leave of court for a continuance of not less than forty-eight hours.

(E) A child shall not be removed from the custody of the parent or guardian unless the court finds that:

(1) The child has been physically injured as defined in §20-7-490 and there is a preponderance of the evidence that the child cannot be protected from further physical injury without being removed.

(2) The child has been endangered as otherwise defined in §20-7-490 and there is clear and convincing evidence that

the child cannot be protected from further harm of the type justifying intervention without being removed.

- (3) There is an alternative placement available but in no case shall the placement be a facility for detention of criminal or juvenile offenders.

(F) The petition for removal may include a petition for termination of parental rights under the jurisdiction conferred on the Family Court by the Family Court Act.

RULE 29. CONTINUANCES

The Court may for good cause grant requests by any party for continuances prior to or during a hearing or may so continue said hearing upon the Court's own motion.

APPENDIX E

§20-7-690. Confidentiality of reports and records; penalties.

(A) All reports made pursuant to this article maintained by the State Department of Social Services, local child protective service agencies and the Central Registry of Child Abuse and Neglect shall be confidential. Any person who disseminates or permits the unauthorized dissemination of such information shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars or be imprisoned for not more than six months, or both.

(B) Information contained in reports described in subsection (A) must not be made available to any individual or institution except:

- (1) Appropriate staff of the State Department of Social Services,

local child protective
services agencies, the
ombudsman of the office of the
Governor, any person or agency
having legal responsibility
or authorization to care for,
treat, or supervise the child
or the child's family,
multidisciplinary evaluation
teams empaneled by the
agencies, and law enforcement
agencies investigating
suspected cases of abuse and
neglect....

APPENDIX F

RULE 26. BURDEN OF PROOF STANDARD

The material averments of fact as set forth in the petition or any affirmative defense shall be established by a preponderance of the evidence.

